

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

CITY OF HUNTINGTON, WEST VIRGINIA,
CITY OF CHARLESTON, WEST VIRGINIA,
CITY OF KENOVA, WEST VIRGINIA, and
TOWN OF CEREDO, WEST VIRGINIA,
municipal corporations,

Plaintiffs

v.

EXPRESS SCRIPTS HOLDING COMPANY;
EXPRESS SCRIPTS, INC.; MCCLOUD
FAMILY PHARMACY, INC.; T&J
ENTERPRISES, INC.; CONTINUUMCARE
PHARMACY LLC; MEDICAL PARK
PHARMACY LTC, INC.; WEST VIRGINIA
CVS PHARMACY, L.L.C.; MRNB, INC.;
RXBYTEL, INC.; RITE AID OF WEST
VIRGINIA, INC.; KROGER LIMITED
PARTNERSHIP I; SAFE RX PHARMACIES,
INC.; PASTM, INC; CROSS LANES
FAMILY PHARMACY, INC; and
BEEWELL PHARMACY, INC.,

Defendants.

Civil Action No. 2:18-cv-00580

Removed from the Circuit Court of
Kanawha County, West Virginia
Civil Action No. 18-CV-340

NOTICE OF REMOVAL

Defendants Express Scripts, Inc. (“ESI”) and Express Scripts Holding Company (“ESHC”)¹ (collectively, “Express Scripts”), by their undersigned attorneys, and pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, give notice of removal of the above-captioned matter, Case No. 18-CV-340, from the Circuit Court of Kanawha County, West Virginia, to the United

¹ Express Scripts files this notice without waiver to any argument that this Court lacks personal jurisdiction over any of the parties.

States District Court for the Southern District of West Virginia, Charleston Division. In support of removal, Express Scripts states as follows:

I. PRELIMINARY STATEMENT

1. On March 14, 2018, Plaintiffs City of Huntington, City of Charleston, City of Kenova, and the Town of Ceredo in West Virginia (collectively, “Plaintiffs” or “Municipalities”) filed their Complaint in the Circuit Court of Kanawha County, West Virginia. Plaintiffs are represented by the City Attorney of Charleston, the City Attorney of Huntington, and three private firms: the Webb Law Centre in Charleston; Forbes Law Offices PLLC in Charleston; and Talcott Franklin P.C. in Huntington and Dallas, Texas.

2. Plaintiffs bring suit against Express Scripts, a Delaware company with its principal place of business in St. Louis, Missouri, the only pharmacy benefits manager (“PBM”) among the defendants. (Compl. ¶ 6.) The other defendants consist of thirteen local and out-of-state pharmacies (collectively, “Pharmacy Defendants”). *Id.* ¶¶ 7–19. Plaintiffs assert two counts against Defendants for (1) negligence, gross negligence, reckless and wilful conduct, and (2) unjust enrichment. The bulk of Plaintiffs’ Complaint is against Express Scripts, while only four out of the 95 paragraphs in the Complaint concern the Pharmacy Defendants.

3. The core of the Complaint is that in 2001, “[d]espite specific requests from its client, PEIA [West Virginia Public Employees Insurance Agency], to take the specific action of requiring prior authorization to avert opioid addiction and death, Express Scripts chose instead to accept payments from the manufacturer of OxyContin, Purdue Pharma L.P. and its affiliates (“Purdue”), to continue to flood the West Virginia marketplace with opioids.” *Id.* ¶ 24; *see also id.* ¶¶ 59, 86. In essence, Plaintiffs allege collusion between Express Scripts and Purdue in

failing to require the prior authorization of OxyContin. *Id.* ¶ 86.²

4. The thrust of Plaintiffs’ allegations against the Pharmacy Defendants is that they dispensed a large number of “addictive opioids” in violation of their duty of care. *Id.* ¶ 65; *see also id.* ¶ 87 (“[T]he Pharmacy Defendants knowingly oversupplied the markets in the Huntington and Charleston areas with addictive opioids and failed to adhere to the standard of care by failing to report suspicious drug orders, failing to properly train employees to spot attempts at drug diversion, and repeatedly filling prescriptions for non-medical purposes.”).

5. Based on these allegations, Plaintiffs claim a litany of injuries to themselves and their 104,400 residents stemming from the alleged flood of addictive opioids into the Municipalities. These include damages in the form of expenses and significant costs incurred in providing health, social, and law enforcement services related to opioid addiction, as well as physical injuries to the citizens, and disruption of quality of life and commerce. *Id.* ¶¶ 73–84. Plaintiffs request damages and equitable relief. *Id.* ¶¶ 88, 95.

6. As explained below, removal of this case is proper because there is diversity jurisdiction based on three, independent grounds: (1) fraudulent joinder, (2) fraudulent misjoinder, and (3) the Class Action Fairness Act (“CAFA”).

7. First, there is complete diversity because Plaintiffs are diverse from Express Scripts, and the local Pharmacy Defendants were fraudulently joined. Second, all the Pharmacy Defendants should be dismissed because they were fraudulently misjoined. Third, removal is proper under CAFA because the present lawsuit promotes the overall purpose of CAFA, essentially is a class action, and there is minimal diversity between the parties. Additionally,

² The Complaint is riddled with inaccuracies and unfounded accusations. These allegations are quoted solely for the purpose of demonstrating why removal is appropriate.

there is diversity jurisdiction because the amount in controversy exceeds the jurisdictional amounts under 28 U.S.C. § 1332(a) and CAFA.

II. THERE IS COMPLETE DIVERSITY OF CITIZENSHIP BETWEEN PLAINTIFFS AND ALL PROPERLY JOINED DEFENDANTS

8. Removal is proper under 28 U.S.C. §§ 1441 and 1332 because complete diversity exists between Plaintiffs and all properly joined defendants. A defendant may remove a state court action if there is complete diversity of citizenship among the parties, and the defendant satisfies other statutory requirements. 28 U.S.C. § 1441(a); *see also Lontz v. Tharp*, 413 F.3d 435, 339 (4th Cir. 2005). For diversity jurisdiction, there must be (i) complete diversity and (ii) the amount of controversy must exceed \$75,000. 28 U.S.C. § 1332(a).

9. There is complete diversity under the theory of fraudulent joinder, as well as under the separate and distinct theory of fraudulent misjoinder. Plaintiffs are political subdivisions of the State of West Virginia, and thus are West Virginia citizens for purposes of diversity jurisdiction. *See Moor v. Alameda Cty.*, 411 U.S. 693, 717 (1973) (“[A] political subdivision of a State, unless it is simply ‘the arm or alter ego of the State,’ is a citizen of the State for diversity purposes.” (citation omitted)); *accord S.C. Dep’t of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 303 (4th Cir. 2008).

10. In determining citizenship for diversity jurisdiction, a corporation is “a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business” 28 U.S.C. § 1332(c)(1). ESI and ESHC are incorporated in Delaware, with their principal place of business in St. Louis, Missouri. (Compl. ¶¶ 5–6.) Hence, they are completely diverse from Plaintiffs.

11. Moreover, the Complaint alleges that three of the Pharmacy Defendants are out-of-state: Continuumcare Pharmacy LLC, Safe RX Pharmacies, Inc., and Kroger Limited Partnership I. *Id.* ¶¶ 9, 11, 15.

12. The Complaint also alleges that the remaining ten Pharmacy Defendants are local and citizens of West Virginia: McCloud Family Pharmacy, Inc.; T&J Enterprises, Inc.; Medical Park Pharmacy LTC, Inc.; PASTM, Inc; West Virginia CVS Pharmacy, LLC³; Rite Aid of West Virginia, Inc.; MRNB, Inc.; Rxbytel, Inc.; Cross Lanes Family Pharmacy, Inc.; and Beewell Pharmacy, Inc. (collectively, “Local Pharmacy Defendants”). *Id.* ¶¶ 7–8, 12–14, 16–19.

A. The Non-Diverse Pharmacy Defendants Are Fraudulently Joined

13. There is complete diversity because there are no possible causes of action against the Local Pharmacy Defendants, and thus they were fraudulently joined. The Southern District of West Virginia recently applied and opined on the doctrine of fraudulent joinder and the separate and distinct doctrine of fraudulent misjoinder. The doctrine of fraudulent joinder “requires the court to disregard the citizenship of a party who is deemed to have been fraudulently joined.” *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 3:17-cv-01362, 2017 WL 3317300, at *3 (S.D. W. Va. Aug. 03, 2017); *see also Cnty. Comm’n of McDowell Cty. v. McKesson Corp.*, 263 F. Supp. 3d 639, 644 (S.D. W. Va. 2017) (same).

14. To establish fraudulent joinder, “a removing defendant must show either (1) there is no possibility that the plaintiff can establish a cause of action against the removing defendant,

³ Although the Complaint alleges that West Virginia CVS Pharmacy, LLC (“CVS LLC”) is local, its sole member is CVS Pharmacy, Inc., which is incorporated and has its principal place of business in Rhode Island. For diversity purposes, a limited liability company is a citizen of the states of which its members are citizens, rather than its place of formation or principal place of business. *See Travelers Indem. Co. of Am. v. Portal Healthcare Sols., L.L.C.*, 644 F. App’x 245, 247 (4th Cir. 2016) (citing *Cent. W. Va. Energy Co. v. Mountain State Carbon, L.L.C.*, 636 F.3d 101, 103 (4th Cir.2011)). Accordingly, CVS LLC is an out-of-state diverse company.

or (2) that there has been outright fraud in plaintiff's pleading of jurisdictional facts." *City of Huntington*, 2017 WL 3317300, at *3 (citing *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993)); *McKesson*, 263 F. Supp. at 644 (same). "[A] finding of fraudulent joinder is warranted when the record before the court demonstrates either that no cause of action is stated against the non-diverse defendant, or *in fact* no cause of action exists." *Ashworth v. Albers Med., Inc.*, 395 F. Supp. 2d 395, 403 (S.D. W. Va. 2005) (citation and quotes omitted).

15. Here, the Local Pharmacy Defendants were fraudulently joined because there is no possible cause of action against them as a matter of law under (1) the West Virginia Medical Professional Liability Act ("MPLA"), West Virginia Code § 55-7B-6(b), and (2) the immunity statute for pharmacies under West Virginia Code § 30-5-21.

1. The West Virginia Medical Professional Liability Act Precludes Claims Against the Fraudulently Joined Local Pharmacy Defendants

16. First, there is no possible claim against the Local Pharmacy Defendants because the Complaint lacks any allegation that Plaintiffs complied with the procedural requirements under the MPLA before filing suit. The MPLA provides, in relevant part:

At least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in litigation.

W. Va. Code § 55-7B-6(b). The definition of "health care provider" expressly includes

"pharmacists" within the definition of "health care provider." *See* W. Va. Code § 55-7B-2(g).⁴

⁴ Given the amendment in 2015, the court's ruling in *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484 (2007), that "health care provider" did not include a pharmacy, is inapposite. In *Phillips*, the court was interpreting the prior version of the statute under Section 55-7B-2(c) (1986). The West Virginia Legislature amended the definition of health care provider expressly to include pharmacist. *See Minnich v. MedExpress Urgent Care, Inc.-W. Va.*, 238 W. Va. 533, 536 n.12 (2017) ("As part of the legislative amendments to the MPLA in 2015, the definition of a 'health care provider' was expanded to include additional entities such as . . . pharmacist . . . ; the scope of such providers was also broadened to include 'any person supervised by or acting

Section 55-7B-6(b) imposes procedural requirements for filing a medical tort claim, including (i) at least 30 days before filing suit, the plaintiff must serve notice on defendant of his intent to bring suit, and (ii) the notice must contain a “screening certificate of merit” executed by a qualified expert under oath. *City of Huntington*, 2017 WL 3317300, at *3; *McKesson*, 263 F. Supp. 3d at 644. If plaintiff does not satisfy these requirements, the court must dismiss the case. *City of Huntington*, 2017 WL 3317300, at *3 (citing *Flagg v. Stryker Corp.*, 819 F.3d 132, 137–38 (5th Cir. 2016) (en banc)); *McKesson*, 263 F. Supp. 3d at 644 (same).

17. Here, Plaintiffs have not alleged in their Complaint that they have complied with the pre-suit notice of claim or provided a screening certificate. Accordingly, because Plaintiffs have no possibility of recovery against the Local Pharmacy Defendants, they were fraudulent joined and thus should be disregarded for purposes of diversity jurisdiction.

2. West Virginia’s Non-Liability Statute for Pharmacies Also Precludes Claims Against the Fraudulently Joined Local Pharmacy Defendants

18. Second, there is no claim against the Local Pharmacy Defendants because they are immune under West Virginia Code § 30-5-21 for tort liability. This section provides:

All persons, whether licensed pharmacists or not, shall be responsible for the quality of all drugs, chemicals and medicines they may sell or dispense, with the exception of those sold in or dispensed unchanged from the original retail package of the manufacturer, in which event the manufacturer shall be responsible.

W. Va. Code § 30-5-21(a). Courts have interpreted this provision to mean that “the legislature intended to abrogate liability of pharmacists with respect to the quality of the drugs sold in or dispensed unchanged from the original retail package of the manufacturer.” *Ashworth*, 395 F. Supp. 2d at 405; *see also Walker v. Rite Aid of W. Va., Inc.*, 2003 WL 24215831, at *4 (S.D. W.

under the direction of a licensed professional, any person taking actions or providing service or treatment pursuant to or in furtherance of a physician’s plan of care, a health care facility’s plan of care, medical diagnosis or treatment.”).

Va. Oct. 14, 2003) (“[Section 30-5-21(a)] prescribes that a retail seller who sells any drug, prescription or nonprescription, is not responsible for the quality of the drug where it was sold unchanged from its original package.”).⁵

19. Section 30-5-21(a) applies to this Complaint because the crux of Plaintiffs’ tort claims against the Pharmacy Defendants is that they dispensed large amounts of “addictive” opioid prescription drugs without due care. *See* Compl. ¶ 87. The addictive quality of opioids is allegedly at the heart of the opioid crisis, and the reason opioid prescription drugs are allegedly harmful, leading to numerous injuries, death, health emergencies, and ensuing economic damages and interference with the Municipalities’ quality of life and commerce. *See, e.g., id.* ¶ 30 (“West Virginia is a rural state deeply wounded by and suffering from a plague of heroin and opioid addiction.” (citation and quotes omitted)); ¶ 31 (“Because of the flood of opioids, cities like Charleston, Huntington, and Kenova and towns like Ceredo have had to deal with the crippling effects of widespread opioid addiction.”); ¶ 32 (“Opioid addiction destroys families, friendships, careers, and financial security.”); ¶ 68 (“Because of this epidemic, numerous human services organizations in the Municipalities have opened or expanded to serve those with opioid addictions.”).

20. The alleged addictiveness of opioids goes squarely to the quality of the drugs. *See, e.g., id.* ¶ 28 (“An innate and hazardous property of opioids is their tendency, especially when used repeatedly over time, to induce tolerance. . . . This tolerance contributes to the risk of addiction and overdose.”). Plaintiffs further do not allege that the Pharmacy Defendants manufactured opioids, altered them, or removed the opioids from their original packaging.

⁵ West Virginia Code § 30-5-21(a) was formerly numbered under Section 30-5-12(a), but the text of the provision remains the same.

Courts have opined that Section 30-5-21(a) clearly abrogates liability in such instances. *See Ashworth*, 395 F. Supp. 2d at 405–06; *Thomas v. Wyeth*, No. CIV. A. 5:05-0094, 2005 WL 3754203, at *2–*3 (S.D. W. Va. 2005); *In re Rezulin Prods. Liability Litig.*, 133 F. Supp. 2d 272, 294 (S.D.N.Y. 2001). Because Plaintiffs’ claims for negligence and unjust enrichment under Counts I and II in the Complaint are predicated on the Pharmacy Defendants’ dispensation of addictive opioids, Section 30-5-21(a) applies to immunize them against these claims. *Ashworth*, 395 F. Supp. 2d at 406, 408.

B. Pharmacy Defendants Are Fraudulently Misjoined

21. There is complete diversity under the separate and distinct theory of fraudulent misjoinder. The Pharmacy Defendants are fraudulently misjoined because the handful of allegations against them concern dispensation of addictive opioids, which has nothing to do with the alleged collusion between Express Scripts and Purdue in denying a prior authorization request from PEIA.

22. Under fraudulent misjoinder, “the inquiry is whether claims against the diverse and non-diverse defendants are sufficiently related to be properly joined in a single case.” *City of Huntington*, 2017 WL 3317300, at *3; *McKesson Corp.*, 263 F. Supp. 3d at 645. To be properly joined, the claims “must (1) arise out of the same transaction or occurrence, and (2) present a question of law or fact common to all defendants.” *City of Huntington*, 2017 WL 3317300, at *4 (citing Rule 20 of the Federal Rule of Civil Procedure and West Virginia Civil Procedure); *McKesson Corp.*, 263 F. Supp. 3d at 646 (same). This is a conjunctive test – both elements must be met. The claims against the Pharmacy Defendants fail both prongs.⁶

⁶ There is also no requirement to show either outright fraud, or that there was no possibility that the plaintiff would be able to join the diverse and non-diverse claims. *City of Huntington*, 2017 WL 3317300, at *6; *McKesson Corp.*, 263 F. Supp. 3d at 645.

23. First, the claims against the Pharmacy Defendants are misjoined because they do not arise out of the same transaction or occurrence as the claims against Express Scripts. Plaintiffs' claims against Express Scripts are premised on an alleged collusion with Purdue to deny PEIA's request for prior authorization of OxyContin in exchange for incentive payments. *See* Compl. ¶¶ 24, 59. In contrast, Plaintiffs' claims against the Pharmacy Defendants are premised on generalized allegations that they dispensed addictive opioids. *See id.* ¶¶ 63–65. There is simply no overlap between Express Scripts' alleged collusion with Purdue and the pharmacies' dispensation of opioid prescription drugs.

24. Second, the claims against the Pharmacy Defendants are fraudulently misjoined because they present no common question of law or fact. As explained above, there is no alleged factual overlap between the allegations against Express Scripts and the Local Pharmacy Defendants. Similarly, there are no common legal issues. While Plaintiffs assert claims for negligence and unjust enrichment against all the defendants, the legal issues are distinct for Express Scripts and the Pharmacy Defendants. For example, legal duty is a threshold inquiry for Plaintiffs' negligence claims and will depend on the circumstances of the case. *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 280 (2016). The legal duty for a reasonably prudent PBM will necessarily be a separate standard and analysis than for "a reasonably prudent pharmacy." (Compl. ¶ 65.) Likewise, because breach and causality are intertwined with legal duty, those legal issues will differ as well.

25. Finally, there is no commonality for the unjust enrichment claims. Plaintiffs allege that Express Scripts "accepted significant funding from Purdue," while the Pharmacy Defendants "received, and some continue to receive, profits from the sale of controlled opioid substances in the Plaintiff municipalities." *Id.* ¶¶ 90, 92. Whether Express Scripts was unjustly

enriched by the alleged funding from Purdue has nothing to do with whether the Pharmacy Defendants were unjustly enriched when they profited from the opioid sales.

26. For these reasons, the cases against Express Scripts and the Pharmacy Defendants are separate and distinct. The claims against the Pharmacy Defendants should therefore be dismissed. *See City of Huntington*, 2017 WL 3317300, at * 5 (concluding plaintiff's claims against a prescribing physician were misjoined and dismissing claims for lack of jurisdiction); *McKesson*, 263 F. Supp. 3d at 647 (same).

III. THIS ACTION MAY ALSO BE REMOVED UNDER CAFA

27. Express Scripts may also properly remove this action to this Court under the Class Action Fairness Act ("CAFA"), 28 U.S.C. §§ 1332(d) and 1453(b), because (i) litigation of this case in federal court promotes CAFA's overall purpose, (ii) the present lawsuit essentially is a class action suit, and (iii) the statutory requirements under CAFA are satisfied.

A. Litigation In Federal Court Promotes CAFA's Overall Purpose

28. First, this lawsuit is precisely the type of case that Congress intended to be litigated in federal court when it enacted CAFA. Congress's overall purpose in enacting CAFA was "to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications." S. Rep. No. 109-14, 35, 2005 U.S.C.C.A.N. 3, 34; *see also Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014) ("CAFA's primary objective is to ensure Federal court consideration of interstate cases of national importance." (citations and quotes omitted)).

29. The present lawsuit is one of hundreds of cases filed across the country involving opioid prescription drugs against pharmacy manufacturers, distributors, and others. The federal multidistrict ("MDL") opioid litigation action, alone, has over 450 individual cases that have become part of a national narrative involving an opioid "crisis" and "epidemic" that has

purportedly besieged almost every state across the country.⁷ Plaintiffs readily employ this narrative in their Complaint, asserting that their claims touch upon issues of national importance. *See, e.g.*, Compl. ¶ 29 (reciting the President’s pronouncement that the “opioid crisis is a national emergency” and “a serious problem the likes of which we have never had.” (quotes omitted)); *id.* ¶¶ 29–30 (“The heroin and opioid epidemic is one of the great public health problems of our times. . . . West Virginia is a rural state deeply wounded by and suffering from a plague of heroin and opioid addiction.” (citation and quotes omitted)). As Plaintiffs’ own Complaint avers, the issues in this case implicate factual and legal issues that span well beyond state lines, and thus, should be litigated in federal court with the other MDL lawsuits for a more efficient proceeding.⁸

30. Indeed, one of the Plaintiffs here, the City of Huntington, filed a similar suit that was recently removed to this Court. In denying a motion to remand, this Court observed:

Here, where the opioid epidemic is pervasive and egregious, there is at least a possibility of prejudice to the defendants at the hands of a jury drawn exclusively from the very county that is the plaintiff in this suit. A federal jury casts a wider net and is drawn from a division that comprises several counties. All may have an opioid problem, but not one that is specific to the plaintiff county.

City of Huntington, 2017 WL 3317300, at *2. A finding of diversity jurisdiction in this matter is consistent with and promotes the purpose of CAFA.

⁷ *See In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio) (Polster, J.), D.E. 215 [April 4, 2018 Conditional Transfer Order].

⁸ In this respect, this case is distinguishable from *City of Charleston v. West Virginia-Am. Water Co.*, No. 2:16-01531, 2016 WL 3460439 (S.D. W. Va. June 21, 2016), where the Court declined to extend CAFA for diversity jurisdiction purposes. That case involved a localized chemical spill into the Elk River that contaminated the water supply of the City of Charleston and Kanawha County. In contrast, the present lawsuit implicates interstate issues of national significance that should be litigated with the other MDL lawsuits. Moreover, while the court in *City of Charleston* applied a narrow, literal reading of “class action” under CAFA, *see id.* at *3, subsequent case law and the framework applied in the context of *parens patriae* cases favor a more expansive interpretation of “class action” for removal purposes. *See infra*, Section III(B).

B. This Case Essentially Is a Class Action

31. Second, CAFA applies here because this case essentially is a class action, and should be treated as such for the purpose of diversity jurisdiction. While Plaintiffs have not alleged a putative class action on the face of the Complaint, the Court should look to the overall Complaint to determine whether it is a “class action in all but name.” *W. Va. ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 452 (E.D. Pa. 2010); *see also Williams v. Employers Mut. Cas. Co.*, 845 F.3d 891, 901 (8th Cir. 2017) (“[L]awsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions.”).

32. Section 1332(d)(2) of the U.S. Code provides that “district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant.” Even when a plaintiff does not ostensibly invoke a class action by name, a defendant may remove where the action operates as such. *See Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424–25 (5th Cir. 2008) (holding defendant properly removed action under CAFA brought by Louisiana through its Attorney General against insurers because the real parties in interest were the policy holders); *W. Va. ex rel. McGraw*, 705 F. Supp. 2d at 452 (holding defendant properly removed action brought by the State of West Virginia against Comcast under CAFA because subscribers were the real parties in interest).

33. CAFA defines a “class action” as “any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.” 28 U.S.C. § 1332(d)(1)(B). Consistent with Congress’s overall objective in favoring federal diversity

jurisdiction over class actions with interstate ramifications, “the definition of ‘class action’ is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labelled ‘class actions’ Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions.” S. Rep. No. 109-14, 35, 2005 U.S.C.C.A.N. 3, 34.

34. Courts have refused to “prioritize a complaint’s use of magic words over its factual allegations,” and have held that CAFA jurisdiction exists even where the complaint “does not seek class certification” or “omit[s] reference to” a state statute “analogous to Rule 23.” *Williams*, 845 F.3d at 900–01. Courts should construe complaints generously in favor of jurisdiction and should not employ any presumption against removability. *See Dart Cherokee*, 135 S. Ct. at 554 (“[N]o antiremoval presumption attends cases invoking CAFA, a statute Congress enacted to facilitate adjudication of certain class actions in federal court.”).

35. Here, the City of Huntington, City of Charleston, City of Kenova, and the Town of Ceredo are acting as representatives for a class of residents who ESI allegedly harmed by its failure to require prior authorization of OxyContin since 2001. The Complaint alleges that the City of Huntington is a municipal corporation in Cabell and Wayne Counties, with a population of approximately 49,138; that the City of Charleston is a municipal corporation in Kanawha County, with a population of approximately 50,404; that the City of Kenova is a municipal corporation in Wayne County, with a population of approximately 3,400; and that the Town of Ceredo is a municipal corporation in Wayne, County, with a population of approximately 1,450. (Compl. ¶¶ 1–5.) Collectively, these Municipalities have approximately 104,400 people.

36. It appears that Plaintiffs may be alleging injuries not only to themselves, but also on behalf of constitutive residents who have suffered both economic and non-economic harms.

See, e.g., id. ¶ 78 (“Criminal vagrants from outside the state have harmed citizens of all socioeconomic status in the Municipalities.”); ¶ 82 (“Thus, many West Virginians suffer various injuries that result in opioid prescriptions at the hand of Defendants’ formularies.”); ¶ 84 (“Helping children affected by the opioid crisis further adds to the burden imposed on the Municipalities, including helping remediate the impact of birth addiction, youth addiction, or addicted parents.”). Plaintiffs’ costs in providing health, social, and emergency services for opioid addiction, emergencies, and death are also borne by the resident taxpayers who bear the costs for these services. The alleged interference with the quality of life and disruption of commerce are also injuries that Municipalities and residents bear collectively.

37. Moreover, the Municipalities’ injuries are an aggregation of and derive from their residents’ injuries. This is because the alleged injuries stem from an opioid addiction, which necessarily inflicts a person first, and then passes on to the Municipalities. The Municipalities’ injuries cannot be viewed part and parcel from the injuries suffered by the residents. Damages, too, will be a calculation of aggregate damages resulting from individual instances of opioid addiction and death.

38. The present lawsuit also resembles a class action because the putative classes bear the qualities of numerosity, commonality, typicality, and the adequacy requirements under Rule 23(a) of the Federal Rule of Civil Procedure and the West Virginia Rule of Civil Procedure. First, the putative classes consist of thousands of alleged members, and thus, are so numerous that joinder is impracticable. Because the putative classes exceed 100 members, CAFA’s exclusion to numerosity also does not apply. *See* 28 U.S.C. § 1332(d)(5)(B).

39. Second, the lawsuit implicates uniform legal and factual issues for the Municipalities and their residents. For example, for all the members, the lawsuit concerns issues

of whether Express Scripts acted negligently when it allegedly refused PEIA's request for prior authorization of OxyContin and instead received incentive payments from Purdue. Separately, the lawsuit is concerned with whether the Pharmacy Defendants acted negligently in dispensing addictive opioids. These issues remain consistent across the members in the putative class.

40. Third, the Municipalities' claims are typical of the claims that individuals could bring. Individual members could bring negligence and unjust enrichment claims against Express Scripts and the Pharmacy Defendants under the same legal theories as the Municipalities.⁹

C. There Is Minimal Diversity

41. There is minimal diversity between Plaintiffs and Express Scripts under CAFA. District courts have original jurisdiction of "any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interests and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2).

42. CAFA eliminates the requirement of complete diversity. Instead, CAFA requires only "minimal diversity" – *i.e.*, the citizenship of any plaintiff differs from that of at least one defendant. 28 U.S.C. § 1332(d)(2)(A).

43. ESI and ESHC are Delaware corporations, with their principal place of business in St. Louis, Missouri. The putative class members are domiciled in West Virginia. Because there is diversity of citizenship between at least one plaintiff and at least one defendant, this action meets the minimal diversity requirement under Section 1332(d)(2)(A).

⁹ Where the Municipalities have not alleged that they conferred any direct benefit on the Defendants, however, it is doubtful they have standing to allege their unjust enrichment claim.

IV. THE AMOUNT IN CONTROVERSY EXCEEDS THE JURISDICTION LIMITS

44. The amount in controversy exceeds both jurisdictional thresholds under 28 U.S.C. § 1332(a) and CAFA. “[A] defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.” *Dart Cherokee*, 135 S. Ct. at 554.

45. Here, Plaintiffs allege a panoply of injuries as a result of an opioid epidemic that has afflicted its Municipalities, affecting over 104,000 of its residents, and extending back to 2001. *See* Compl. ¶¶ 66–84. Given the extent of the alleged injuries and time period, the damages easily exceeds \$75,000, as well as \$5 million.¹⁰

V. COMPLIANCE WITH PROCEDURAL REQUIREMENTS

46. Express Scripts has satisfied all the procedural requirements for removal under 28 U.S.C. § 1446, and Southern District of West Virginia Local Rule 3.4.

47. Express Scripts is filing this Notice of Removal pursuant to 28 U.S.C. § 1441(a) in the United States District Court for the Southern District of West Virginia, Charleston Division, because the state court in which the action was commenced, Kanawha County, is within this federal judicial district and this division. This Notice is signed pursuant to Rule 11 of the Federal Rule of Civil Procedure.

48. Plaintiffs served the Summons and Complaint on Express Scripts through the West Virginia Secretary of State on March 16, 2018. Express Scripts is removing the case within 30 days of that date, and therefore this removal is timely under 28 U.S.C. § 1446(b). *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354–56 (1999).

¹⁰ Express Scripts emphasizes that the amount in controversy represents only what Plaintiffs request at this stage of the proceeding. This is not an admission that Plaintiffs are entitled to recover this amount. *See Hartis v. Chicago Title Ins. Co.*, 694 F.3d 935, 945 (8th Cir. 2012).

49. In accordance with 28 U.S.C. § 1446(a) and Local Rule 3.4(b), a copy of “all process, pleadings, and orders” served upon Express Scripts in the state court action are attached as **Exhibit A**.

50. In accordance with 28 U.S.C. § 1446(d), promptly after filing this Notice, Express Scripts will “give written notice thereof to all adverse parties,” and will “file a copy of the notice with the clerk” of the Circuit Court of Kanawha County. A true and correct copy of the Notice to Plaintiffs and Circuit Court of Filing of Notice of Removal is attached as **Exhibit B**.

51. For the purposes of removal based on diversity jurisdiction under 28 U.S.C. § 1332(a) and 28 U.S.C. § 1446(b), all defendants who have been properly joined and served must consent to removal. However, consent is not required from fraudulently joined or fraudulently misjoined defendants. *See Shaffer v. Nw. Mut. Life Ins. Co.*, 394 F. Supp. 2d 814, 819 (N.D. W. Va. 2005) (“[F]raudulently joined defendants are not required to consent to a co-defendant’s notice of removal.” (citing *Fleming v. United Teachers Assocs. Ins. Co.*, 250 F. Supp. 2d 658, 663 (S.D. W. Va. 2003))); *see also Cooke-Bates v. Bayer Corp.*, No. 3:10-CV-261, 2010 WL 3064304, at *3 (E.D. Va. Aug. 2, 2010) (explaining that fraudulent misjoinder is an exception to the unanimity rule). Nor is consent required from nominal parties. *See Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 259 (4th Cir. 2013) (holding that “a nominal party need not consent to removal”).

52. Likewise, consent is not required under CAFA. *See* 28 U.S.C. § 1453(b) (“A class action may be removed to a district court of the United States in accordance with section 1446 . . . without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.”).

53. Nevertheless, nine out of the thirteen Pharmacy Defendants have consented to removal, as indicated in **Exhibit C**, with the exception of T&J Enterprises, Cross Lanes Family Pharmacy, Rxbytel, Inc., and Safe RX. T&J Enterprises,¹¹ Cross Lanes Family Pharmacy,¹² and Rxbytel¹³ are local pharmacies that have been both fraudulently joined and fraudulently misjoined; thus, consent is not required. Nor is consent required of these defendants under CAFA.

54. Moreover, the consent of Safe RX, a Nevada corporation with its principal place of business in Ohio (Compl. ¶ 11), is not required because it was fraudulently misjoined and is removable under CAFA. Safe RX's consent is also not required because it is a defunct company and a nominal party. *See Hartford Fire Ins.*, 736 F.3d at 259 (holding that "a nominal party need not consent to removal"). A party is nominal if a suit can be resolved without affecting the non-consenting nominal defendant in any reasonably foreseeable way. *See id.* at 260. Where, as here, a defunct entity has no capacity to sue or be sued, there is no legal possibility for the entity to be liable and the entity is therefore nominal.

55. Under Federal Rule of Civil Procedure 17(b), a corporation's capacity to be sued is determined "by the law under which it was organized." Safe RX is a company organized under the laws of Nevada whose charter was revoked on December 21, 2012, as indicated on the West Virginia Secretary of State corporations website, a true and correct copy of which is also attached in **Exhibit D**.¹⁴ Under Nevada Revised Statute 86.505, a dissolved company may sue or

¹¹ Plaintiffs may not have properly served T&J Enterprises.

¹² Attempts were made to contact counsel for Cross Lanes Family Pharmacy, but they could not be reached.

¹³ Rxbytel is currently a defunct company, and could not be reached. Its charter was revoked in November 2013, according to the West Virginia Secretary of State corporations website, a true and correct copy of which is attached in **Exhibit D**.

¹⁴ Attempts were made to contact Safe RX, but it could not be reached.

be sued if the cause of action arises before its dissolution and is commenced within two years after the date of dissolution, and “[a]ny such remedy or cause of action not commenced within the applicable period is barred.” Nev. Rev. Stat. Ann. § 86.505. Here, Plaintiffs commenced suit against Safe RX in March 2018 – more than five years after Safe RX’s charter was revoked in 2012, and is thus clearly barred by the applicable two-year statute of limitations. As such, Safe RX is a nominal party whose consent is not required. *See Khouri v. JPMorgan Chase & Co.*, No. 2:12-CV-1209, 2013 WL 167762, at *3 (D. Nev. Jan. 15, 2013) (disregarding citizenship of defunct entity where no possibility plaintiffs could establish a cause of action brought more than two years after entity dissolved).

56. Nothing in this Notice of Removal shall be interpreted as a waiver or relinquishment of any Defendant’s right to assert any and all defenses and/or objections to the Complaint.

57. If there are any questions that arise as to the propriety of removal of this action, Express Scripts respectfully requests the opportunity to submit briefing, argument, and additional evidence as necessary to support removal of this case.

CONCLUSION

WHEREFORE, Express Scripts hereby removes this action from the Circuit Court of Kanawha County, to the United States District Court for the Southern District of West Virginia.

Dated: April 16, 2018

Respectfully Submitted,

/s/ Charles R. Bailey
Charles R. Bailey
(WV Bar No. 0202)
Justin C. Taylor
(WV Bar No. 8014)
Bailey & Wyant P.L.L.C.

And

Matthew I. Menchel (*pro hac vice* pending)
(FL Bar No. 12043)
Adriana Riviere-Badell (*pro hac vice* pending)
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*Attorneys for Defendants Express Scripts
Holding Company and
Express Scripts, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that pursuant to 28 U.S.C. § 1446(d), a true and correct copy of the foregoing NOTICE OF REMOVAL was served on the following on April 16, 2018 via First Class U.S. Mail:

Counsel for Plaintiffs:

Charles R. "Rusty" Webb Bar No. 4782 The Webb Law Centre, PLLC 716 Lee St. E. Charleston, West Virginia 25301 Phone: (304) 344-9322 Fax: (304) 344-1157 Email: rusty@rustywebb.com	W. Jesse Forbes, Esq. Bar No. 9956 Forbes Law Offices, PLLC 1118 Kanawha Blvd., East Charleston, West Virginia 25301 Phone: (304) 343-4050 Fax: (304) 343-7450 Email: wjforbes@forbeslawwv.com
Dennis C. Taylor Bar No. 6965 Debra Price Bar No. 2979 Talcott Franklin P.C. 831 Fourth Avenue, Suite 201 Huntington, West Virginia 25701 Phone: (304) 586-9847 Fax: (800) 727-0659 Email: dennis@talcottfranklin.com Email: dee@talcottfranklin.com	Talcott J. Franklin Shannon W. Conway Matthew Browne Talcott Franklin P.C. 1920 McKinney Avenue, 7th Floor Dallas, Texas 75201 Phone: (214) 321-3838 Fax: (800) 727-0659 Email: tal@talcottfranklin.com Email: sconway@talcottfranklin.com Email: matt@talcottfranklin.com
Paul D. Ellis Bar No. 8726 City Attorney City of Charleston P.O. Box 2749 Charleston, West Virginia 25330 Phone: (304) 348-8031 Fax: (304) 348-0770 Email: paul.ellis@cityofcharleston.org	Scott A. Damron State Bar No. 935 City Attorney City of Huntington P.O. Box 1659 Huntington, WV 25717 Phone: (304) 696-4480 Fax: (304) 696-5538 Email: damrons@cityofhuntington.com

Counsel for Defendants:

<p>Scott W. Andrews VANANTWERP ATTORNEYS, LLP 1544 Winchester Avenue, 5th Floor P.O. Box 1111 Ashland, KY 41105-1111 Telephone: (606) 329-2929 Facsimile: (606) 329-0490 Email: sandrews@vanattys.com <i>Counsel for Defendants, Medical Park Pharmacy, PASTM, Inc., McCloud Family Pharmacy, and Beewell Pharmacy</i></p>	<p>Nicholas Reynolds Owen A. Reynolds Michael A. Meadows CAMPBELL WOODS, PLLC 1002 Third Avenue Post Office Box 1835 Huntington, WV 25719 Telephone: (304) 529-2391 Facsimile: (304) 529-1832 Email: nreynolds@campbellwoods.com Email: oreynolds@campbellwoods.com Email: michaelmeadows@campbellwoods.com <i>Counsel for Defendant MRNB, Inc.</i></p>
<p>Ronda Harvey Bowles Rice LLP 600 Quarrier Street Charleston, WV 25326 Telephone: (304) 347-1701 Email: rharvey@bowlesrice.com <i>Counsel for Defendant Kroger Limited Partnership I</i></p>	<p>Webster J. Arceneaux, III Lewis Glasser PLLC 300 Summers Street, Suite 700 Charleston, West Virginia 25326 Telephone: (304) 345-2000 Email: wjarceneaux@lewisglasser.com <i>Counsel for Defendant Rite Aid of West Virginia, Inc.</i></p>
<p>Sasha Miller Zuckerman Spaeder, LLP 1800 M Street, NW Suite 1000 Washington DC 20036-5807 Telephone: (202) 778-1845 Email: smiller@zuckerman.com</p> <p>Carte P. Goodwin Frost Brown Todd, LLC 500 Virginia Street East, Suite 1100 Charleston, West Virginia 25301-3207 Phone: (304) 348-2422 Facsimile: (304) 345-0115 Email: cgoodwin@fbtlaw.com <i>Counsel for Defendant West Virginia CVS Pharmacy, LLC</i></p>	<p>Gerald M. Titus, III James E. Simon SPILMAN THOMAS & BATTLE, PLLC 300 Kanawha Boulevard, East (Zip 25301) Post Office Box 273 Charleston WV 25321-0273 Telephone: (304) 340-3800 Facsimile: (304) 340-3901 Email: gtitus@spilmanlaw.com Email: jsimon@spilmanlaw.com <i>Counsel for Defendant Continuumcare Pharmacy LLC</i></p>

Other Defendants:

Cross Lanes Family Pharmacy, Inc. Brac Brown P.O. Box 962 Poca, WV, 25159 5516 Bog Tyler Road Cross Lanes, WV, 25313	Safe RX Pharmacies, Inc. Kent Freeman 335 Fourth Avenue Huntington, WV, 25701 503 Fourth Street East South Point, OH, 45680
Rxbytel, Inc. Walter L Moore III 425 W. Washington Street Charleston, WV, 25302	

Dated: April 16, 2018

Respectfully Submitted,
/s/ Charles R. Bailey

Charles R. Bailey
 (WV Bar No. 0202)
 Justin C. Taylor
 (WV Bar No. 8014)
 Bailey & Wyant P.L.L.C.
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 Email: jtaylor@baileywyant.com

*Attorneys for Defendants Express Scripts
 Holding Company and
 Express Scripts, Inc.*

EXHIBIT A

CITY OF HUNTINGTON, WV, CITY OF vs. EXPRESS SCRIPTS HOLDING COMPANY

LINE DATE ACTION

1 03/14/18 # CASE INFO SHEET; COMPLAINT; ISSUED SUM & 30 CPYS; F FEE; RCPT
 2 # 559830; \$425.00
 3 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO BEEWELL
 4 # PHARMACY INC
 5 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO CROSS
 6 # LANES FAMILY PHARMACY INC
 7 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO RXBYTEL
 8 # INC
 9 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO MRNB, INC
 10 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO KROGER
 11 # LIMITED PARTNERSHIP I
 12 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO RITE AID
 13 # OF WV INC
 14 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO WV CVS
 15 # PHARMACY LLC
 16 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO PASTM, INC
 17 # D/B/A MEDICAP PHARMACY
 18 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO SAFE RX
 19 # PHARMACIES INC
 20 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO MEDICAL
 21 # PARK PHARMACY LTC, INC
 22 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO
 23 # CONTINUUMCARE PHARMACY LLC
 24 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO T&J
 25 # ENTERPRISES INC
 26 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO MCCLLOUD
 27 # FAMILY PHARMACY INC
 28 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO EXPRESS
 29 # SCRIPTS INC
 30 03/19/18 # LET FR SS DTD 3/16/18; SUM W/RET (3/16/18 SS) AS TO EXPRESS
 31 # SCRIPTS HOLDING CO.
 32 03/27/18 # (14) E-CERTS FR SS

A TRUE COPY
 TESTED *Cate*
 CIRCUIT COURT KANAWHA COUNTY, WVA
 By *Crugh*

CIVIL CASE INFORMATION STATEMENT
CIVIL CASES
 (Other than Domestic Relations)

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

I. CASE STYLE:

Plaintiff(s)

The City of Huntington, West Virginia;
City of Charleston, West Virginia;
City of Kenova, West Virginia, and;
Town of Ceredo, West Virginia,
municipal corporations,

CASE #

JUDGE:

FILED
 2018 MAR 14 P 3:14
 CATHY S. GATSON, CLERK
 KANAWHA COUNTY CIRCUIT COURT
 18C 340
 King

A TRUE COPY
 TESTED City Clerk
 CIRCUIT COURT KANAWHA COUNTY, WVA.
 B. Clough

Defendants	Days to Answer	Type of Service
<u>Express Scripts Holding Company</u>	<u>30</u>	<u>Secretary of State</u>
<u>Express Scripts, Inc.</u>	<u>30</u>	<u>Secretary of State</u>
<u>McCloud Family Pharmacy, Inc.</u>	<u>30</u>	<u>Secretary of State</u>
<u>T&J Enterprises, Inc.</u>	<u>30</u>	<u>Secretary of State</u>
<u>Continuumcare Pharmacy LLC</u>	<u>30</u>	<u>Secretary of State</u>
<u>Medical Park Pharmacy LTC, Inc.</u>	<u>30</u>	<u>Secretary of State</u>
<u>West Virginia CVS Pharmacy, L.L.C.</u>	<u>30</u>	<u>Secretary of State</u>
<u>MRNB, Inc.</u>	<u>30</u>	<u>Secretary of State</u>
<u>Rxbytel, Inc.</u>	<u>30</u>	<u>Secretary of State</u>

PYMT Type K
 Rcpt # 559830 \$200 ☒ \$135
 Iss. Sum. 30 No Sum. Iss
☒ Ret. to Atty. \$20cm X
☒ Mailed CM/RM \$5 clk X
☒ Mailed to sos w/ck#
☒ Sent to w/ck# ☒ \$15 mdf X **15**

<u>Rite Aid of West Virginia, Inc.</u>	<u>30</u>	<u>Secretary of State</u>
<u>Kroger Limited Partnership I</u>	<u>30</u>	<u>Secretary of State</u>
<u>Safe RX Pharmacies, Inc.</u>	<u>30</u>	<u>Secretary of State</u>
<u>PASTM, Inc.</u>	<u>30</u>	<u>Secretary of State</u>
<u>Cross Lanes Family Pharmacy, Inc.</u>	<u>30</u>	<u>Secretary of State</u>
<u>Beewell Pharmacy, Inc.</u>	<u>30</u>	<u>Secretary of State</u>

Original and _____ copies of complaint enclosed/attached.

PLAINTIFF: City of Huntington, West Virginia, City of Charleston, West Virginia, City of Kenova, West Virginia, and Town of Ceredo, West Virginia DEFENDANTS: Express Scripts Holding Company; Express Scripts, Inc.; McCloud Family Pharmacy, Inc.; T&J Enterprises, Inc.; Continuumcare Pharmacy LLC; Medical Park Pharmacy LTC, Inc.; West Virginia CVS Pharmacy, L.L.C.; MRNB, Inc.; Rxbytel, Inc.; Rite Aid of West Virginia, Inc.; Kroger Limited Partnership I; Safe RX Pharmacies, Inc.; PASTM, Inc.; Cross Lanes Family Pharmacy, Inc.; and Beewell Pharmacy, Inc.	CASE NO: 18-C-
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II. TYPE OF CASE:

General Civil <input checked="" type="checkbox"/>	Adoption
Mass Litigation	Administrative Appeal
Habeas Corpus/Other Extraordinary Writ	Civil Appeal from Magistrate Court
Guardianship	Miscellaneous Civil Action
Other	Mental Hygiene
	Medical Malpractice

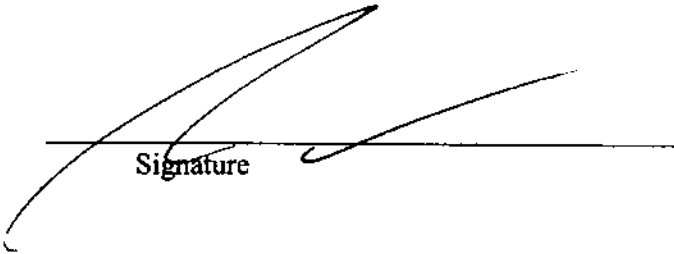
III. JURY DEMAND: ☒ Yes ☐ NoCASE WILL BE READY FOR TRIAL BY (MONTH/YEAR): January / 2019**IV. Do you or any of your clients or witnesses in this case require special accommodations due to a disability?** ☐ Yes ☒ No

If yes, please specify:

- ☒ Wheelchair accessible hearing room and other facilities
☒ Interpreter or other auxiliary aid for the hearing impaired
☒ Reader or other auxiliary aid for the visually impaired
☒ Spokesperson or other auxiliary aid for the speech impaired
☒ Other: _____

Attorney Name: W. Jesse Forbes (WVSB #9956)Firm: Forbes Law Offices, PLLCAddress: 1118 Kanawha Blvd. East,
Charleston, WV 25302Telephone: 304-343-4050*Representing:*

- ☒ Plaintiff ☐ Defendant
☐ Cross-Complainant ☐ Cross-Defendant



Signature

Dated:

3/14/18

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**CITY OF HUNTINGTON, WEST VIRGINIA,
CITY OF CHARLESTON, WEST VIRGINIA,
CITY OF KENOVA, WEST VIRGINIA, and
TOWN OF CEREDO, WEST VIRGINIA,
municipal corporations**

Plaintiffs,

v.

Civil Action No. **18-C-310**
King

**EXPRESS SCRIPTS HOLDING COMPANY;
EXPRESS SCRIPTS, INC.; MCCLOUD
FAMILY PHARMACY, INC.; T&J
ENTERPRISES, INC.; CONTINUUMCARE
PHARMACY LLC; MEDICAL PARK
PHARMACY LTC, INC.; WEST VIRGINIA
CVS PHARMACY, L.L.C.; MRNB, INC.;
RXBYTEL, INC.; RITE AID OF WEST
VIRGINIA, INC.; KROGER LIMITED
PARTNERSHIP I; SAFE RX PHARMACIES,
INC.; PASTM, INC; CROSS LANES
FAMILY PHARMACY, INC; and
BEEWELL PHARMACY, INC.**

Defendants.

COMPLAINT

The City of Huntington, West Virginia and City of Charleston, West Virginia, the City of Kenova, West Virginia, and the Town of Ceredo, West Virginia ("Plaintiffs"), by counsel Talcott Franklin P.C., The Webb Law Centre, PLLC, and Forbes Law Offices, PLLC, allege against Defendants Express Scripts Holding Company ("ESHC") and Express Scripts, Inc. ("ESI", and collectively with ESHC, the "PBM Defendants" or "Express Scripts"), and Plaintiff City of Huntington alleges against Defendants Medical Park Pharmacy LTC, Inc.; Safe RX Pharmacies, Inc.; Continuumcare Pharmacy LLC; T&J Enterprises, Inc.; West Virginia CVS Pharmacy, LLC; Rite Aid of West Virginia, Inc., PASTM, Inc., McCloud Family Pharmacy, Inc. (collectively the

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2018 MAR 14 P 3:14
CATHY S. CATSON, CLERK
KANAWHA COUNTY CLERK'S OFFICE

A TRUE COPY
TESTE *Cathy S. Catson* CLERK
CIRCUIT COURT KANAWHA COUNTY W.VA.
By Chugh

“Huntington Pharmacy Defendants”); and Plaintiff City of Charleston alleges against MRNB, Inc.; Beewell Pharmacy, Inc.; Kroger Limited Partnership I; Rite Aid of West Virginia, Inc.; Rxbytel, Inc.; West Virginia CVS Pharmacy, LLC and Cross Lanes Family Pharmacy, Inc. (collectively, the “Charleston Pharmacy Defendants”); and Plaintiff Town of Ceredo alleges against Defendant West Virginia CVS Pharmacy, LLC (collectively with the Huntington Pharmacy Defendants and Charleston Pharmacy Defendants, the “Pharmacy Defendants”) on information and belief:

Description of the Parties and Venue

1. Plaintiff City of Huntington is a municipal corporation located in Cabell and Wayne Counties, West Virginia. Huntington is a Class II city pursuant to W. Va. Code § 8-1-3(2), having a population of approximately 49,138 and adopting a charter in accordance with the laws of the State of West Virginia.

2. Plaintiff City of Charleston is a municipal corporation located in Kanawha County, West Virginia. Charleston is a Class I city pursuant to W. Va. Code § 8-1-3(1), having a population of approximately 50,404 and adopting a charter in accordance with the laws of the State of West Virginia.

3. Plaintiff City of Kenova is a municipal corporation located in Wayne County, West Virginia. Kenova is a Class III city pursuant to W. Va. Code § 8-1-3(3), having a population of approximately 3,400 and adopting a charter in accordance with the laws of the State of West Virginia.

4. Plaintiff Town of Ceredo is a municipal corporation located in Wayne County, West Virginia. Ceredo is a Class IV town pursuant to W. Va. Code § 8-1-3(4), having a

population of approximately 1,450 and adopting a charter in accordance with the laws of the State of West Virginia.

5. Defendant ESHC is a Delaware corporation with its principal place of business in St. Louis, Missouri. ESHC may be served with process through its registered agent, Corporation Service Company, 251 Little Falls Drive, Wilmington, Delaware 19808.

6. Defendant ESI, a wholly owned subsidiary of ESHC, is a Delaware corporation with its principal place of business in St. Louis, Missouri. ESI is a pharmacy benefit management company and may be served with process through its registered agent, Corporation Service Company, 209 West Washington Street, Charleston, WV 25302. In 2012, ESI completed its acquisition of Medco Health Solutions Inc. ("Medco") to become the largest PBM in the nation.

7. Defendant McCloud Family Pharmacy, Inc. is a West Virginia corporation with its principal place of business in Huntington. McCloud is a pharmacy and may be served with process through its registered agent, Carter & Company A.C., 537 Sixth Avenue, Huntington, WV, 25701.

8. Defendant T&J Enterprises, Inc. is a West Virginia corporation with its principal place of business in Huntington. T&J is a pharmacy and may be served with process through its registered agent, Angela S. Ronk, 2404 Adams Avenue, Huntington, WV, 25704.

9. Defendant Continuumcare Pharmacy LLC dba PharMerica is a foreign limited liability company with its principal place of business in Louisville, KY. Continuumcare is a pharmacy in Huntington, and may be served with process through its registered agent Corporation Service Co., 209 West Washington Street, Charleston, WV 25302.

10. Defendant Medical Park Pharmacy LTC, Inc. is a West Virginia corporation with its principal place of business in Huntington. Medical Park is a pharmacy and may be served

with process through its registered agent Michelle Dillon, 315 Royal Birkdale Dr., Lavalette, WV, 25535.

11. Defendant Safe RX Pharmacies, Inc. is a Nevada corporation with its principal place of business in South Point, OH. Safe RX Pharmacies, Inc. is the survivor by merger of Safescript of Ohio, Inc., a foreign corporation with the same principal place of business as its survivor. Safe RX Pharmacies, Inc. and its predecessors in interest operated the Safescript Pharmacy #6 in Huntington, and may be served with process through its registered agent Keith A. Grimes & Associates, LLC, 145 S. Moapa Valley Boulevard, Suite 4, Overton, NV 89040.

12. Defendant PASTM, Inc. dba Medicap Pharmacy is a West Virginia corporation with its principal place of business in Huntington, WV, and may be served with process through its registered agent Peter A. Thomas, 4352 5th St. Rd., Huntington, WV 25701.

13. Defendant West Virginia CVS Pharmacy, LLC is a West Virginia limited liability corporation with its principal place of business in Charleston, WV. West Virginia CVS operates multiple pharmacies in Huntington, and may be served with process through its registered agent CT Corporation, 5400 D Big Tyler Road, Charleston, WV, 25313.

14. Defendant Rite Aid of West Virginia, Inc. is a West Virginia corporation with its principal place of business in Camp Hill, PA. Rite Aid of West Virginia operates multiple pharmacies in Charleston, and may be served with process through its registered agent CT Corporation, 5400 D Big Tyler Road, Charleston, WV, 25313.

15. Defendant Kroger Limited Partnership I is a foreign limited partnership with its principal place of business in Cincinnati, OH. Kroger operates multiple pharmacies in Charleston, and may be served with process through its registered agent Corporation Service Company, 209 W. Washington Street, Charleston, WV, 25304.

16. Defendant MRNB, Inc. is a West Virginia corporation with its principal place of business in Ceredo, WV. MRNB operates multiple pharmacies including Trivillian's Pharmacy in Charleston, and may be served with process through its registered agent Nathan E. Barnes, 420 4th Street, No. 20, Ceredo Plaza, Ceredo, WV, 25507.

17. Defendant Rxbytel, Inc. is a West Virginia corporation with its principal place of business in Charleston, WV. Rxbytel operated a pharmacy in Charleston and may be served with process through its registered agent Walter L. Moore III, 425 W. Washington Street, Charleston, WV, 25302.

18. Defendant Cross Lanes Family Pharmacy, Inc. is a West Virginia corporation with its principal place of business in Poca, WV. Cross Lanes operates a pharmacy in Cross Lanes, West Virginia serving Charleston residents, and may be served with process through its registered agent, Brac Brown, P.O. Box 962, Poca, WV 25159.

19. Defendant Beewell Pharmacy, Inc. is a West Virginia corporation with its principal place of business in South Charleston, WV. Beewell operates a pharmacy in South Charleston serving Charleston residents, and may be served with process through its registered agent Jawed Ali Sherwani, 435 West Main Street, Oak Hill, WV 25901.

20. Venue is proper in the Circuit Court of Kanawha County, West Virginia because Defendants do business in Kanawha County. Jurisdiction is also proper in this court of general jurisdiction.

Statement of Pertinent Facts

21. In 2001, the West Virginia Public Employees Insurance Agency ("PEIA") attempted to persuade Express Scripts, which served as "Pharmacy Benefits Manager" to PEIA,

to require prior authorization for oxycodone prescriptions for state employee health plan beneficiaries.

22. Prior authorization of pharmaceutical prescriptions is a method by which potentially dangerous and costly over-prescribing of drugs is monitored and restricted. Prior authorization procedures have been shown to reduce opioid prescribing by 15 percent.

23. Typically, prior authorization entails a doctor calling an insurer to confirm that a given drug is available to be prescribed to a patient. Insurers may place certain limitations on the dispensing of a drug – including restrictions on the length of time a drug may be prescribed and the specific conditions for which it is available for prescription.

24. Merck Medco, since acquired by Express Scripts, was at the time contracted with PEIA to provide pharmacy benefit management services on behalf of the state's health plan participants. Despite specific requests from its client, PEIA, to take the specific action of requiring prior authorization to avert opioid addiction and death, Express Scripts chose instead to accept payments from the manufacturer of OxyContin, Purdue Pharma L.P. and its affiliates ("Purdue"), to continue to flood the West Virginia marketplace with opioids. Express Scripts thus ignored the requests to require prior authorization, and continued the unabated flow of pills into West Virginia communities.

25. Express Scripts, as a pharmacy benefits manager, is a crucial link in the pharmaceutical supply chain, and has a duty to secure and monitor controlled substances such as prescription opioids and prevent diversion of these addictive drugs into illicit channels.

26. Meanwhile, all Pharmacy Defendants sold, and many continue to sell, prescription opioids within the Plaintiff municipalities and to residents of the municipalities.

27. Express Scripts' efforts to resist any impediment to the free flow of opioids into West Virginia has led to an over-prescribing of opioids – not only in terms of doses and necessity, but also in terms of quantity. These quantities are ultimately provided to end users of the drugs by the Pharmacy Defendants. Prescription opioids that go unused, combined with a lack of education about their dangers and the need to properly dispose of them, lead to tragic but predictable results: people looking to use drugs recreationally, very often teenagers, obtain these opioids and use them illicitly, resulting in addiction, overdoses, and death. Many parents discover too late that these supposedly safe prescription opioids fell into the hands of their children and their children's peers, who, with limited judgment and experience, had their lives derailed, if not destroyed, by opioid addiction. Roughly 70% people who took opioids for non-medical uses obtained them from a friend or relative.

A. The Impact of Prescription Opioids

28. Opioids are a class of pain relieving medications that include the illicit drug heroin as well as the prescription medications oxycodone, hydrocodone, codeine, morphine and fentanyl. Opioid medications exert their analgesic effect by primarily binding to mu-opioid receptors in the brain. When opioids attach to these receptors, they reduce the perception of pain and produce a sense of euphoria, leading to positive reinforcement. An innate and hazardous property of opioids is their tendency, especially when used repeatedly over time, to induce tolerance. Tolerance occurs when the person no longer responds to the drug as strongly as they did at first, thus necessitating a higher dose to achieve the same effect. This tolerance contributes to the risk of addiction and overdose. Some opioids show tolerance after a single dose. In addition, drug dependence or susceptibility to withdrawal symptoms is another clinically

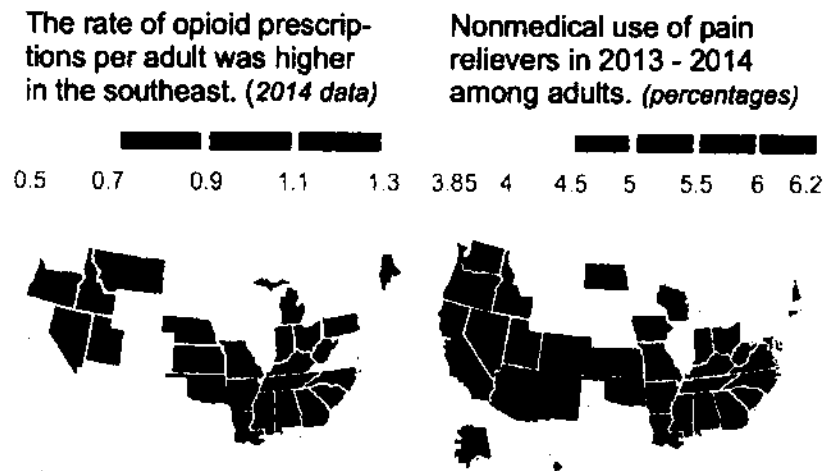
important consequence of repeated exposure to escalating dosages of opioids. Why some people develop addiction to these inherently addictive medications while others do not is not clear.

29. On August 11, 2017, the President called the opioid crisis a “national emergency,” and in doing so said “it is a serious problem the likes of which we have never had.” The United States, with 4.6% of the world’s population, consumes over 80% of the world’s opioids. According to the United States District Court for the Southern District of West Virginia:

The heroin and opioid epidemic is one of the great public health problems of our time. The CDC found that opioids, primarily prescription pain relievers and heroin, are the chief drugs associated with overdose deaths. In 2015, the most recent year for which data is available, opioids were involved in 33,091 deaths, which is more than 63% of all drug overdose deaths. On average, ninety-one Americans die from an opioid overdose every day. Preliminary numbers for 2016 suggest that overdose deaths are growing at a rate comparable to the rate of H.I.V.-related deaths at the height of the H.I.V. epidemic.

United States v. Walker, 2017 WL 2766452, at *5 (S.D. W. Va. June 26, 2017) (citations omitted).

30. West Virginia “is a rural state deeply wounded by and suffering from a plague of heroin and opioid addiction.” *Id.* at *3. As the following map demonstrates, West Virginia is among the states with the highest rate of opioid prescriptions per adult, but near the middle on the scale of non-medical use of pain relievers among adults.



31. Because of the flood of opioids, cities like Charleston, Huntington, and Kenova and towns like Ceredo have had to deal with the crippling effects of widespread opioid addiction. The CDC recently estimated that the total economic burden of prescription opioid abuse costs the United States \$78.5 billion per year, which includes significantly increased costs for health care and addiction treatment and dramatic strains on human services and criminal justice systems, as well as substantial losses in workforce productivity.

32. The cost in human lives and suffering is staggering. Opioids are the leading cause of accidental deaths in the country, surpassing deaths caused by car accidents. Opioid addiction destroys families, friendships, careers, and financial security. Exposure to these dangerous drugs comes through purportedly legitimate prescriptions written by doctors and dentists, making this epidemic unique.

33. Every day more than 1,000 people are admitted to emergency rooms across the country because of opioid-related abuse. Naloxone, a costly medication used to block and reverse the effects of an opioid overdose, is now routinely carried by law enforcement and EMTs if the Municipality can afford it or keep it in stock. Individuals addicted to opioids, but without a

prescription or the resources to obtain them, often turn to heroin, sparking another crisis directly related to the widespread abuse of prescription opioids. As the United States District Court for the Southern District of West Virginia has observed:

These drugs are far more dangerous and far more available for abuse. Opioids are in the medicine cabinets of homes all over America and are available at every hospital and doctor's office. With the rise of prescription opioid abuse, heroin, which up until recently had been a tiny fraction of the illicit drug trade, came roaring back. The return of that pale horse may prove to be the event horizon of drug abuse and addiction.

Walker, 2017 WL 2766452, at *6. To that observation, the Court added in a footnote: "See Revelation 6:8 (King James) ('And I looked, and behold a pale horse: and his name that sat on him was Death, and Hell followed with him. And power was given unto them over the fourth part of the earth, to kill with sword, and with hunger, and with death, and with the beasts of the earth.')." *Id.* n.49. According to the National Institute on Drug Abuse, roughly 80% of heroin dependent users reported using prescription opioids prior to heroin. By contrast, in the 1960s, over 80% of heroin dependent users started with heroin. As Huntington's Fire Chief Jan Rader recently noted, 80% of the heroin dependent people "that I deal with daily started with a legal prescription" to an opioid.

34. As the United States District Court for the Southern District of West Virginia noted:

West Virginia has the highest rate of fatal drug overdoses in the nation—and that rate continues to rise. This past year, 86% of overdose deaths involved at least one opioid. From 2001 to 2016, the number of people in the state who died from a drug overdose increased 400%. Our state's fatal drug overdose rate was 41.5 per 100,000 people in 2015, far above the national average of 16.3 per 100,000 people. The West Virginia Health Statistics Center released information that showed that at least 844 people in the state died of drug overdoses in 2016, an increase of 16.9% from 2015 to 2016.

Id. at *6 (citations omitted).

35. The same court noted earlier this month that it has:

[P]reviously detailed the severe and devastating impact that the opioid crisis has had on this country and, particularly, on West Virginia. Since then, the statistics have grown only more frightening. From 2015 to 2016, the number of deaths caused by heroin overdoses increased by nearly 17%, and the number caused by fentanyl (and its analogues) more than doubled. Together, heroin, fentanyl, and prescription opioids currently account for nearly 78% of all drug-related deaths in 2016. The devastation caused by synthetic opioids will only increase as the drugs spread and additional analogues are created, gradually infecting and destroying the body politic.

United States v. Wilmore, No. 2:16-cr-00177, 2017 WL 4532156, at *4 (S.D. W.Va. Oct. 10, 2017) (Memorandum Opinion and Order) (citations omitted).

36. The United States District Court for the Southern District of West Virginia further noted yet another devastating impact of this crisis on the community:

As Mr. Wilmore's conduct makes clear, armed dealers are selling drugs in broad daylight at our local Walgreen's, at the Town Center Mall, and even in the parking lot of our children's middle schools. [...] Thus, when criminal activity is carried out in the context of a dangerous and devastating epidemic and involves conduct so dangerous to the Southern District of West Virginia, the public's interest in participation is at its zenith.

Id. at *5-6.

37. The Court further noted:

The true victims here are the people of the Southern District of West Virginia. The current heroin and opioid epidemic is carving a path of pain and suffering that cuts across race, socioeconomic status, and age and afflicts everyone in our community.

Id. at *10.

38. The epidemic is in part the result of Express Scripts' enthusiasm, as far back as 2001 and continuing to this day, to suborn its own client's efforts to minimize opioid prescribing in favor of accepting continued payments from opioid manufacturers to foster continued over-prescription of opioids.

39. In part as a result of Defendants' conduct, Plaintiffs have suffered significant economic and non-economic damages, including, but not limited to, increased health care costs, insurance and self-insurance costs, health services costs, costs related to responding to and

dealing with opioid-related crimes and emergencies, additional first responders, first responder and building department overtime, remediation of dilapidated and fire-damaged properties, criminal vagrancy, and other significant public safety costs and disruptions to quality of life and commerce, as described below.

B. The Role of Pharmacy Benefit Managers in the Prescription Drug Marketplace

40. Pharmacy Benefit Managers (“PBMs”) have arisen over the past fifteen years to control a significant chokepoint in the distribution of pharmaceuticals in the United States, and indeed in the provision of healthcare in the United States. As originally conceived, PBMs sold third-party administration services to their clients (health insurance plans, employers, and governments) for the management of prescription drug plans. These companies initially played an intermediary role between insurers, pharmacies, and manufacturers, providing an administrative role to insurers and negotiating drug prices with manufacturers.

41. For performing this back-office function, the PBMs would be paid a fee for each prescription that was processed. But by consolidating the prescription processing of myriad individual payers, PBMs would in theory be in a position to negotiate cheaper drug prices from manufacturers given the pricing power of the combined PBM client base. This combined purchasing power of the PBMs was thought to be a key component to lowering healthcare costs in the United States.

42. The 2003 enactment of Medicare Part D, providing prescription drug coverage for Medicare beneficiaries, created a significant increase in demand for PBM services. Meanwhile, overall spending on prescription drugs in the United States steadily rose. The result was significant growth for the industry. Over time, PBMs have consolidated their position at the

intersection of drug manufacturers, pharmacies, and patients, to exert tremendous power over the entire drug supply chain.

43. Currently, just three companies – Express Scripts, CVSHealth, and OptumRx (owned by United Health) - control 80% of the pharmacy benefits in the United States. Defendants are the largest PBM in the country. With this market concentration, PBMs are able to determine which drugs, from which manufacturers, will be included on which tier of formularies. In turn, PBMs are able to determine which drug plans are able to obtain access to which formularies. In short, PBMs are in a position to determine how much of which drug goes where in the United States.

1. *Formularies*

44. As the dominant PBM, Express Scripts provides administrative services to health plans, including formulary management, the development of pharmacy networks, generic substitution, mail service pharmacies and drug utilization reviews.

45. Formularies – lists of available drugs, in essence – are maintained by Express Scripts and provided to prescribers to aid in the adherence to Defendants' approved list of drugs.

46. Among other things, PBM formularies define the reimbursement methods for individual drugs, including not only which drugs are to be made available for which specific diagnoses, but also in what amounts, at what price (or co-pay), and what level of authorization (including prior authorization) is required for each drug.

2. *Rebates*

47. In an opaque process deliberately obscured from their own clients, PBMs routinely generate income from drug manufacturers as well.

48. For obvious reasons drug manufacturers view favorable placement of a drug on a formulary as critical to utilization rates (i.e. sales) of the drug throughout the PBM's network of participating plans. Simply put, inclusion in formulary lists is critical to manufacturers' ability to sell their products.

49. Knowing this, PBMs negotiate for payments from drug manufacturers in the form of rebate discounts on specific drugs. Drug manufacturers make these payments because of the PBM's power to determine the availability of the manufacturers' drugs within the marketplace through the use of formularies. In exchange for these payments, PBMs ensure favorable treatment for a manufacturer's drug under a given formulary.

50. Through these formularies, Defendants are in a position to pick and choose which drugs will be made available for treatment of which conditions. This gate-keeping function is all too lucrative: up to one third of all expenditures on branded prescription drugs in 2015 came in the form of rebates to PBMs.

51. Indeed, manufacturers are eager to pay Defendants a hefty toll to assure their own drugs' safe passage through Defendants' choke point, and compete for inclusion of their drugs on Defendants' formularies. What is more, manufacturers pay Defendants to remove any impediments to the uninterrupted flow of product into the marketplace. One such instance involves Purdue paying the Defendants to ignore requests for prior authorization such as those made by West Virginia.

3. *PBMs Favor Opioids over Non-Addictive Alternatives*

52. While PBMs force drug manufacturers to compete amongst themselves for favorable placement on PBM formulary lists, the corollary to the frenzy for favorable placement is all of the drugs and other treatments left off the lists.

53. A review of PBM plans covering 37.5 million Americans found, for example, that very few required any prior approval for common opioids, but that *every* drug plan required prior approval for lidocaine patches, which may be used to treat some of the same ailments but are not considered addictive.

54. PBMs, including Express Scripts, place greater hurdles to obtaining non-addictive forms of pain therapy than for opioids.

55. What is more, PBMs that have discouraged any impediment to the continued flow of addictive opioids see no problem placing these same impediments on medication used to *treat opioid addiction*. Indeed, it is easier for most patients to get opioids than treatment for addiction. For example, Suboxone, a common prescription treatment for opioid dependency, required prior authorization in two-thirds of plans reviewed by *ProPublica* and the *New York Times*.

56. One insurer, who contracted with Defendants Express Scripts for the provision of PBM services, has denied a patient, who previously weaned herself from an opioid addiction, access to a non-addictive pain drug Lyrica for the treatment of her bladder condition as a result of the PBM's formulary.

4. *Express Scripts' Collaboration with Purdue in West Virginia to Deny Prior Authorization on Opioid Prescriptions*

57. "We felt a need to put some type of management on the prescription because we saw death claim certificates come in with the cause of death of oxycodone," attested Felice Joseph, the Pharmacy Director of PEIA, in explaining why PEIA sought prior authorization for oxycodone prescriptions for its plan participants.

58. "We like to keep prior authorization off of any drug," said a former Purdue official in deposition testimony regarding PEIA's request to place prior authorization on oxycodone.

59. These allegations came to light in a report of a recently unsealed court file, which stated that Express Scripts accepted incentive payments from Purdue to avoid the use of pre-authorization for oxycodone, the primary ingredient in Purdue's OxyContin.

5. *Purdue's Guilty Plea to Felony Criminal Charges Related to OxyContin*

60. On May 9, 2007, in connection with a guilty plea to felony criminal charges for making misrepresentations respecting OxyContin, Purdue admitted: "Beginning on December 12, 1995 and continuing until on or about June 30, 2001, certain PURDUE supervisors and employees, with the intent to defraud or mislead, marketed or promoted OxyContin as less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications."

61. In the same document, Purdue also admitted: "From March 2000 through June 30, 2001, certain PURDUE sales representatives, while promoting and marketing OxyContin, falsely told some health care providers that the *Reduced Liability Statement* and the amended statement meant that OxyContin did not cause a 'buzz' or euphoria, caused less euphoria, had less addiction potential, had less abuse potential, was less likely to be diverted than immediate-release opioids, and could be used to 'weed out' addicts and drug seekers."

6. *Express Scripts Has Direct Knowledge of Opioid Prescribing Patterns in West Virginia and was Aware of the Unfolding Addiction Crisis*

62. Given their central role in the pharmaceutical supply chain, Express Scripts knew or should have known of the unreasonably large number of addictive opioids coming into Plaintiffs.

C. The Role of the Pharmacy Defendants in the Prescription Drug Marketplace

63. In the pharmaceutical supply chain, pharmacies represent the final step before the drugs enter the hands of the end-user. Given this position, pharmacies are given considerable responsibility for patient care, and cannot fill prescriptions without a legitimate medical purpose.

64. Indeed, CVS, one of the Pharmacy Defendants, stated in 2015 that “Pharmacists have a legal obligation under state and federal law to determine whether a controlled substance was issued for a legitimate purpose and to decline to fill prescriptions they have reason to believe were issued for a non-legitimate purpose.”

65. The Pharmacy Defendants regularly filled significantly large numbers of opioid prescriptions that would have been deemed questionable or suspicious, or issued for a non-legitimate purpose, by a reasonably prudent pharmacy, in violation of the standard of care for pharmacies.

Damages

66. Because of Defendants’ conduct, Plaintiffs have suffered significant and ongoing harm.

A. The Municipalities have incurred expenses providing human services to the community because of Defendants’ conduct.

67. Because many people who become addicted to opioids are originally exposed to these drugs through prescriptions, the opioid crisis has ensnared a broader cross-section of the population than previous drug epidemics. People who would not otherwise have encountered street drugs like heroin are initially hooked on prescription opioids. This has expanded the population of people who are addicted in the Municipalities. For these people, a prescription for opioids was the first step to addiction and drug abuse.

68. Because of this epidemic, numerous human services organizations in the Municipalities have opened or expanded to serve those with opioid addictions.

69. Moreover, increasing numbers of people addicted require medical treatment for related maladies and infections, including but not limited to Hepatitis C, HIV, and liver failure.

B. The Municipalities have incurred significant costs responding to opioid-related health emergencies.

70. Each Municipality has also borne enormous costs responding to opioid-related health emergencies. The Municipal Police Departments as well as the Municipal and Volunteer (but Municipality supported) Fire Departments provide emergency medical services in the Municipalities, responding to emergency calls, dispatching emergency medical service personnel, including emergency medical technicians, or EMTs, in ambulances or fire trucks.

71. Over the past decade, the number of opioid-related emergency calls to which the Municipal Police Departments and the Municipal and Volunteer Fire Departments have responded has risen sharply. Responding to opioid overdoses is expensive. It involves sending ambulances, engines, and specially trained staff to the emergency. People who have overdosed on opioids must often be transported to the emergency room. Responding to such emergencies requires each Municipality to increase its police presence and incur significant overtime expenses. The costs of materials, maintenance, medication, and staff time, alone, are enormous and, of course, time, materials, and money spent addressing opioid overdoses means fewer resources and less time to respond to other medical emergencies.

72. Due in part to the increase in emergency calls, the costs to Plaintiffs with a Volunteer Fire Departments have greatly increased. The costs of operating a Fire Department have risen significantly, including daily calls to rescue overdose victims. One Plaintiff's Fire Chief notes that "26% of the time that my guys get a call ... they're going to an overdose ... 10% of that time, it's a death." That Municipality's Fire Department responds to 5.3 overdoses a day.

The Municipalities bear expenses for training and equipping first responders to remedy overdoses, naloxone kits, treating those that survive, and mortuary services for those who do not.

C. Defendants' conduct has caused the Municipalities to incur significant additional public safety related costs.

73. Defendants' conduct has also increased public safety costs for each Municipality.

74. Prescription opioids, including OxyContin, began showing up in drug arrests in each Municipality, and the presence of heroin on the streets of the Municipalities rose steeply.

75. The opioid epidemic has also increased public safety costs in other areas. The Municipalities bear significant costs related to an increased number of arrests for opioid-related crimes. This alone has placed a serious strain on the Municipalities' police resources. Some Municipalities have had to add additional police officers due to increases in opioid related societal consequences.

76. As the United States District Court for the Southern District of West Virginia has observed, legal opioid prescriptions begat illegal drugs. This encourages criminals from out of state to relocate to the Municipalities, either to deal drugs or to engage in criminal vagrancy and obtain drugs. This has created a vicious cycle requiring greater police presence while further taxing the Municipalities' resources, without the corresponding tax revenue that comes from traditional forms of city-to-city migration. This problem prompted the United States Drug Enforcement Agency to arrange for additional agents in Charleston to serve West Virginia, along with agents serving areas proximate to New Bedford, Massachusetts, Cincinnati, Cleveland, Raleigh, North Carolina, and Long Island, New York.

77. This astounding and devastating rise of opioids—both “legal” and illegal—has affected public safety in the Municipalities, and the Municipal Police Departments' and Municipal and Volunteer Fire Departments' work and resources. Increased illegal drug

trafficking has caused a rise in other criminal activities in the Municipalities. The price of prescription opioids on the black market is significant, forcing many addicts to turn to burglary or other property crimes to pay for their addiction. Not only does this impair the quality of life for everyone in each Municipality, but the Municipality is also forced to address these crimes, expending police and investigatory resources, which have direct costs to the Municipality. For example, some Municipalities were forced to buy software programs to monitor salvage yards and pawnshops for stolen merchandise, incurring ongoing expenses for such programs. Because each Municipality expends significant resources to address increased drug trafficking and property crimes, the Municipalities have had to divert resources from other public safety issues in the Municipalities.

78. Criminal vagrants from outside the state have harmed citizens of all socioeconomic status in the Municipalities. Among the most vulnerable are homeless West Virginians, who have been raped and assaulted by out-of-state criminal vagrants. One Plaintiff's Police Chief recently noted that he has seen things happen this year "that I've never seen in my career. I've seen a woman set on fire and murdered, I've seen a man get murdered with a machete. Our property crimes are through the roof. Most of the people watching probably know someone that's had their car broken into or garage broken into and this has been a particular bad summer for that." That Municipality recently saw a church that provided breakfast to the local homeless population suspend operation temporarily due to violence by out-of-state criminal vagrants.

79. In sum, Defendants' conduct has unequivocally caused serious and ongoing harm to each Municipality. Each Municipality's costs for health care, public safety, human and public

services, and law enforcement have all risen, and each Municipality as a community has suffered serious and tragic consequences as a result.

F. Defendants' conduct has disrupted the Municipalities' quality of life and commerce.

80. Defendants' conduct has also contributed to the deterioration of neighborhoods and increased the costs of remediating abandoned housing. People addicted to opioids often live in abandoned houses. The houses deteriorate rapidly due to damage, abuse, and neglect. Addiction can be so powerful that the addicted abandon standards of cleanliness and sanitation, producing dangerous environmental pollution, including used needles, human waste, and rotted food. The Municipalities bear the cost of removing the residents, repairing or bulldozing the houses, and remediating the environmental pollutants. At least one Plaintiff has requested funds from its urban renewal authority to remediate dilapidated housing related to the opioid crisis. Moreover, the crisis has caused the Municipalities to pay overtime for building department employees.

81. The pollution and physical damage associated with the opioid crisis also takes place in public streets, parks, and parking lots, where the Municipalities bear the cost of cleaning up human waste, used needles, property destruction, and litter by people who have entered the Municipalities to obtain drugs.

82. West Virginia has some of the hardest workers in the world. Many work in difficult physical jobs that have a high risk of injury. Thus, many West Virginians suffer various injuries that result in opioid prescriptions at the hand of Defendants' formularies. The Municipalities and West Virginia businesses now have difficulty finding new employees who can pass a drug test or do not exhibit other symptoms of addiction, damaging the economy in the Municipalities and suppressing economic growth.

83. The deteriorating quality of life in the Municipalities, including deteriorating neighborhoods, criminal vagrancy, and overt drug dealing, has hampered the Municipalities' efforts to attract new businesses and sources of tax revenue and employment. At least one Plaintiff had to impose a user fee on those working in the city but residing outside the city limits to pay for additional police officers.

84. Helping children affected by the opioid crisis further adds to the burden imposed on the Municipalities, including helping remediate the impact of birth addiction, youth addiction, or addicted parents. The impact of children growing up with one or more addicted parents will have tremendous social and financial consequences for the Municipalities, whether or not these children move into foster care. Children born addicted or who become addicted at a young age will require additional resources to remediate unique challenges, as they grow older. The costs to the Municipalities will include special educational resources, on-going treatment and therapy, group homes, and remediating negative social outcomes.

COUNT I
NEGLIGENCE, GROSS NEGLIGENCE, RECKLESS AND WILLFUL CONDUCT

85. The elements of a negligence cause of action under West Virginia law are: (a) the existence of a duty; (b) the breach of that duty; (c) loss or damage to another caused by the breach; and (d) actual loss or damage to another. Gross negligence and reckless and willful conduct under West Virginia law involve the same elements but different degrees of awareness or likelihood of loss or damage.

86. The PBM Defendants owed a duty of care to the Municipalities, including but not limited to taking steps to ensure against the misuse, abuse, and over-prescription of opioids. In violation of this duty, The PBM Defendants colluded with opioid manufacturers to encourage the over-prescription of opioids in the Municipalities. In addition, one who engages in affirmative

conduct, and thereafter realizes that affirmative conduct created an unreasonable risk of harm to another is under a duty to exercise reasonable care to prevent the threatened harm.

87. The Pharmacy Defendants owed a duty of care to the Municipalities, including but not limited to taking steps to ensure against the misuse, abuse, and over-prescription of opioids. In violation of this duty, the Pharmacy Defendants knowingly oversupplied the markets in the Huntington and Charleston areas with addictive opioids and failed to adhere to the standard of care by failing to report suspicious drug orders, failing to properly train employees to spot attempts at drug diversion, and repeatedly filling prescriptions for non-medical purposes.

88. As a direct and proximate result of Defendants' negligence, gross negligence and willful and reckless, conduct, each Municipality has suffered and will continue to suffer harm and is entitled to damages.

COUNT II
UNJUST ENRICHMENT

89. Plaintiffs incorporate by reference the allegations contained in this Complaint's preceding paragraphs.

90. The PBM Defendants accepted significant funding from Purdue and other pharmaceutical companies.

91. The PBM Defendants' acceptance of this funding in the context of rebates from opioid manufacturers co-opted Defendants so that Defendants failed to recognize the dangerous and addictive nature of opioids and encouraged the over-prescription of opioid medications in lieu of less addictive alternatives.

92. The Pharmacy Defendants received, and some continue to receive, profits from the sale of controlled opioid substances in the Plaintiff municipalities.

93. These funds constitute blood money. Thousands have died and millions suffer because of Defendants' cooption.

94. Plaintiffs have conferred a benefit upon the PBM Defendants and the Pharmacy Defendants by paying for the external costs of Defendants actions. Specifically, the cities pay for the costs of the harm Defendants are inflicting on the very communities in which they operate and from which they derive their business.

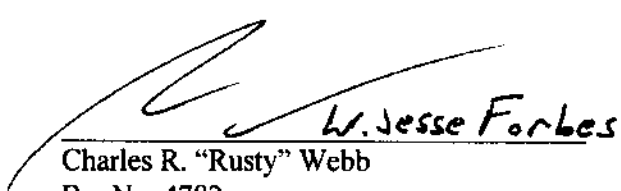
95. The Municipalities require these funds to remediate Defendants' failings.

WHEREFORE, the Municipalities respectfully request that the Court enter judgment against all Defendants and in favor of each Municipality and that it grant the requested equitable relief; each Municipality all damages permissible under law, including attorneys' fees and costs, and pre-judgment and post-judgment interest; and any further relief the Court deems just and proper.

JURY TRIAL DEMAND

Plaintiffs demand a trial by jury on all claims and of all issues so triable.

Dated: March 14, 2018



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° A professional corporation.

* Licensed only in Michigan, North Carolina, South Carolina (inactive), and Texas. *Pro hac vice* motion to be filed.

ò Licensed only in D.C., Texas, and Virginia. *Pro hac vice* motion to be filed.

Licensed only in Texas. *Pro hac vice* motion to be filed.

EXHIBIT B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**CITY OF HUNTINGTON, WEST VIRGINIA,
CITY OF CHARLESTON, WEST VIRGINIA,
CITY OF KENOVA, WEST VIRGINIA, and
TOWN OF CEREDO, WEST VIRGINIA,
municipal corporations,**

Plaintiffs,

**Civil Action No. 18-C-340
Honorable Charles King**

v.

**EXPRESS SCRIPTS HOLDING COMPANY;
EXPRESS SCRIPTS, INC.; MCCLOUD
FAMILY PHARMACY, INC.; T&J
ENTERPRISES, INC.; CONTINUUMCARE
PHARMACY LLC; MEDICAL PARK
PHARMACY LTC, INC.; WEST VIRGINIA
CVS PHARMACY, L.L.C.; MRNB, INC.;
RXBYTEL, INC.; RITE AID OF WEST
VIRGINIA, INC.; KROGER LIMITED
PARTNERSHIP I; SAFE RX PHARMACIES,
INC.; PASTM, INC; CROSS LANES
FAMILY PHARMACY, INC; and
BEEWELL PHARMACY, INC.,**

Defendants.

**NOTICE TO PLAINTIFFS AND CIRCUIT COURT OF
FILING OF NOTICE OF REMOVAL**

Pursuant to 28 U.S.C.A. § 1446(d), Defendants Express Scripts Holding Company and Express Scripts, Inc. (collectively, “Express Scripts”) give notice to the Plaintiffs, through their counsel, and to the Circuit Court of Kanawha County, West Virginia, that on this date, Express Scripts in the above-styled action have filed a Notice of Removal in the United States District Court for the Southern District for West Virginia, Charleston Division, in order to remove the above-captioned civil action to federal court.

Dated: April 16, 2018

Respectfully Submitted,
/s/ Charles R. Bailey

Charles R. Bailey
(WV Bar No. 0202)
Justin C. Taylor
(WV Bar No. 8014)
Bailey & Wyant P.L.L.C.
500 Virginia Street East, Suite 600
Charleston WV 25301
T: 304 345 4222
F: 304.343.3133
Email: cbailey@baileywyant.com
Email: jtaylor@baileywyant.com

*Attorneys for Defendants Express Scripts
Holding Company and
Express Scripts, Inc.*

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**CITY OF HUNTINGTON, WEST VIRGINIA,
CITY OF CHARLESTON, WEST VIRGINIA,
CITY OF KENOVA, WEST VIRGINIA, and
TOWN OF CEREDO, WEST VIRGINIA,
municipal corporations,**

Plaintiffs

**Civil Action No. 18-C-340
Honorable Charles King**

v.

**EXPRESS SCRIPTS HOLDING COMPANY;
EXPRESS SCRIPTS, INC.; MCCLOUD
FAMILY PHARMACY, INC.; T&J
ENTERPRISES, INC.; CONTINUUMCARE
PHARMACY LLC; MEDICAL PARK
PHARMACY LTC, INC.; WEST VIRGINIA
CVS PHARMACY, L.L.C.; MRNB, INC.;
RXBYTEL, INC.; RITE AID OF WEST
VIRGINIA, INC.; KROGER LIMITED
PARTNERSHIP I; SAFE RX PHARMACIES,
INC.; PASTM, INC; CROSS LANES
FAMILY PHARMACY, INC; and
BEEWELL PHARMACY, INC.,**

Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing “**Notice to Plaintiffs
and Circuit Court of Filing of Notice of Removal**” was served upon the following parties by

First Class U.S. Mail on this day, Monday, April 16, 2018:

Counsel for Plaintiffs:

Charles R. “Rusty” Webb Bar No. 4782 The Webb Law Centre, PLLC 716 Lee St. E. Charleston, West Virginia 25301 Phone: (304) 344-9322 Fax: (304) 344-1157 Email: rusty@rustywebb.com	W. Jesse Forbes, Esq. Bar No. 9956 Forbes Law Offices, PLLC 1118 Kanawha Blvd., East Charleston, West Virginia 25301 Phone: (304) 343-4050 Fax: (304) 343-7450 Email: wjforbes@forbeslawwv.com
---	---

Dennis C. Taylor Bar No. 6965 Debra Price Bar No. 2979 Talcott Franklin P.C. 831 Fourth Avenue, Suite 201 Huntington, West Virginia 25701 Phone: (304) 586-9847 Fax: (800) 727-0659 Email: dennis@talcottfranklin.com Email: dee@talcottfranklin.com	Talcott J. Franklin Shannon W. Conway Matthew Browne Talcott Franklin P.C. 1920 McKinney Avenue, 7th Floor Dallas, Texas 75201 Phone: (214) 321-3838 Fax: (800) 727-0659 Email: tal@talcottfranklin.com Email: sconway@talcottfranklin.com Email: matt@talcottfranklin.com
Paul D. Ellis Bar No. 8726 City Attorney City of Charleston P.O. Box 2749 Charleston, West Virginia 25330 Phone: (304) 348-8031 Fax: (304) 348-0770 Email: paul.ellis@cityofcharleston.org	Scott A. Damron State Bar No. 935 City Attorney City of Huntington P.O. Box 1659 Huntington, WV 25717 Phone: (304) 696-4480 Fax: (304) 696-5538 Email: damrons@cityofhuntington.com

Counsel for Defendants:

Scott W. Andrews VANANTWERP ATTORNEYS, LLP 1544 Winchester Avenue, 5 th Floor P.O. Box 1111 Ashland, KY 41105-1111 Telephone: (606) 329-2929 Facsimile: (606) 329-0490 Email: sandrews@vanattys.com <i>Counsel for Defendants, Medical Park Pharmacy, PASTM, Inc., McCloud Family Pharmacy, and Beewell Pharmacy</i>	Nicholas Reynolds Owen A. Reynolds Michael A. Meadows CAMPBELL WOODS, PLLC 1002 Third Avenue Post Office Box 1835 Huntington, WV 25719 Telephone: (304) 529-2391 Facsimile: (304) 529-1832 Email: nreynolds@campbellwoods.com Email: oreynolds@campbellwoods.com Email: michaelmeadows@campbellwoods.com <i>Counsel for Defendant MRNB, Inc.</i>
Ronda Harvey Bowles Rice LLP 600 Quarrier Street Charleston, WV 25326 Telephone: (304) 347-1701 Email: rharvey@bowlesrice.com <i>Counsel for Defendant Kroger Limited Partnership I</i>	Webster J. Arceneaux, III Lewis Glasser PLLC 300 Summers Street, Suite 700 Charleston, West Virginia 25326 Telephone: (304) 345-2000 Email: wjarceneaux@lewisglasser.com <i>Counsel for Defendant Rite Aid of West Virginia, Inc.</i>

<p>Sasha Miller Zuckerman Spaeder, LLP 1800 M Street, NW Suite 1000 Washington DC 20036-5807 Telephone: (202) 778-1845 Email: smiller@zuckerman.com</p> <p>Carte P. Goodwin Frost Brown Todd, LLC 500 Virginia Street East, Suite 1100 Charleston, West Virginia 25301-3207 Phone: (304) 348-2422 Facsimile: (304) 345-0115 Email: cgoodwin@fbtlaw.com <i>Counsel for Defendant West Virginia CVS Pharmacy, LLC</i></p>	<p>Gerald M. Titus, III James E. Simon SPILMAN THOMAS & BATTLE, PLLC 300 Kanawha Boulevard, East (Zip 25301) Post Office Box 273 Charleston WV 25321-0273 Telephone: (304) 340-3800 Facsimile: (304) 340-3901 Email: gtitus@spilmanlaw.com Email: jsimon@spilmanlaw.com <i>Counsel for Defendant Continuumcare Pharmacy LLC</i></p>
---	---

Other Defendants:

<p>Cross Lanes Family Pharmacy, Inc.</p> <p>Brac Brown P.O. Box 962 Poca, WV, 25159</p> <p>5516 Bog Tyler Road Cross Lanes, WV, 25313</p>	<p>Safe RX Pharmacies, Inc.</p> <p>Kent Freeman 335 Fourth Avenue Huntington, WV, 25701</p> <p>503 Fourth Street East South Point, OH, 45680</p>
<p>Rxbytel, Inc.</p> <p>Walter L Moore III 425 W. Washington Street Charleston, WV, 25302</p>	

Dated: April 16, 2018

Respectfully Submitted,
/s/ Charles R. Bailey

Charles R. Bailey
(WV Bar No. 0202)
Justin C. Taylor
(WV Bar No. 8014)
Bailey & Wyant P.L.L.C.
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Email: jtaylor@baileywyant.com

*Attorneys for Defendants Express Scripts
Holding Company and
Express Scripts, Inc.*

EXHIBIT C

CITY OF HUNTINGTON, WEST VIRGINIA,
CITY OF CHARLESTON, WEST VIRGINIA,
CITY OF KENOVA, WEST VIRGINIA, and
TOWN OF CEREDO, WEST VIRGINIA,
municipal corporations,

Plaintiffs

Civil Action No. _____

Removed from the Circuit Court of
Kanawha County, West Virginia
Civil Action No. 18-C-340

EXPRESS SCRIPTS HOLDING
COMPANY;
EXPRESS SCRIPTS, INC.; MCCLOUD
FAMILY PHARMACY, INC.; T&J
ENTERPRISES, INC.; CONTINUUMCARE
PHARMACY LLC; MEDICAL PARK
PHARMACY LTC, INC.; WEST VIRGINIA
CVS PHARMACY, L.L.C.; MRNB, INC.;
RXBYTEL, INC.; RITE AID OF WEST
VIRGINIA, INC.; KROGER LIMITED
PARTNERSHIP I; SAFE RX
PHARMACIES,
INC.; PASTM, INC; CROSS LANES
FAMILY PHARMACY, INC; and
BEEWELL PHARMACY, INC.,

Defendants.

COMES NOW Defendants, Medical Park Pharmacy, LTC, Inc., PASTM, Inc., McCloud Family Pharmacy Inc., and Beewell Pharmacy, Inc., by and through their undersigned counsel, and hereby notifies this Court, as well as other parties that they consent to the removal of Civil Action No. 18-C-340 from the Circuit Court of Kanawha County, West Virginia to the United States District Court for the Southern

District of West Virginia. Defendants consent to removal, without waiving any defenses, exceptions, or obligations that may exist in their favor on state or federal court.

Dated this 10th Day of April, 2018.

Respectfully submitted,



Scott W. Andrews
VANANTWERP ATTORNEYS, LLP
1544 Winchester Avenue, 5th Floor
P.O. Box 1111
Ashland, KY 41105-1111
sandrews@vanattys.com
Office: (606) 329-2929
Fax: (606) 329-0490
*Counsel for Defendants, Medical Park
Pharmacy, PASTM, Inc., McCloud Family
Pharmacy, and Beewell Pharmacy*

Nicholas Reynolds (WVSB 3068)
Owen A. Reynolds (WVSB 13035)
Michael A. Meadows (WVSB 10100)
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oreynolds@campbellwoods.com
michaelmeadows@campbellwoods.com
Counsel for Defendant, MRNB, Inc.

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

CITY OF HUNTINGTON, WEST VIRGINIA,)
CITY OF CHARLESTON, WEST VIRGINIA,)
CITY OF KENOVA, WEST VIRGINIA, and)
TOWN OF CEREDO, WEST VIRGINIA,)
municipal corporations,)

Plaintiffs,

v.

EXPRESS SCRIPTS HOLDING COMPANY;)
EXPRESS SCRIPTS, INC.; MCCLOUD)
FAMILY PHARMACY, INC.; T&J)
ENTERPRISES, INC.; CONTINUUMCARE)
PHARMACY LLC; MEDICAL PARK)
PHARMACY LTC, INC.; WEST VIRGINIA)
CVS PHARMACY, L.L.C.; MRNB, INC.;)
RXBYTEL, INC.; RITE AID OF WEST)
VIRGINIA, INC.; KROGER LIMITED)
PARTNERSHIP I; SAFE RX PHARMACIES,)
INC.; PASTM, INC; CROSS LANES)
FAMILY PHARMACY, INC; and)
BEEWELL PHARMACY, INC.,)

Defendants.

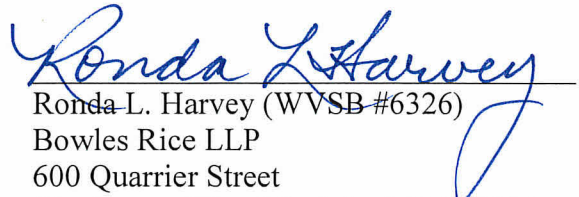
Civil Action No. _____

Removed from the Circuit Court of
Kanawha County, West Virginia
Civil Action No. 18-C-340

CONSENT TO REMOVAL

Defendant, Kroger Limited Partnership I, by and through its undersigned counsel, and hereby notifies this Court, as well as other parties that it consents to the removal of Civil Action No. 18-C-340 from the Circuit Court of Kanawha County, West Virginia to the United States District Court for the Southern District of West Virginia. Defendant consents to removal, without waiving any defenses, exceptions, or obligations that may exist in its favor in either state or federal court.

Dated this 12th Day of April, 2018.


Ronda L. Harvey (WVSB #6326)
Bowles Rice LLP
600 Quarrier Street
Charleston, West Virginia 25326-1386
Telephone: 304-347-1100
rh Harvey@bowlesrice.com
*Counsel for Defendant Kroger Limited
Partnership I*

Rite Aid of West Virginia, Inc.
By Counsel,
/s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III, State Bar #155
LEWIS GLASSER PLLC
Post Office Box 1746
Charleston, WV 25326
(304) 345-2000
wjarceneaux@lgcr.com
*Counsel for Defendant Rite Aid of West
Virginia, Inc.*

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

CITY OF HUNTINGTON, WEST VIRGINIA,)	
CITY OF CHARLESTON, WEST VIRGINIA,)	
CITY OF KENOVA, WEST VIRGINIA, and)	Civil Action No. _____
TOWN OF CEREDO, WEST VIRGINIA,)	
municipal corporations,)	Removed from the Circuit Court of
)	Kanawha County, West Virginia
Plaintiffs)	Civil Action No. 18-C-340
)	
v.)	
)	
EXPRESS SCRIPTS HOLDING COMPANY;)	
EXPRESS SCRIPTS, INC.; MCCLOUD)	
FAMILY PHARMACY, INC.; T&J)	
ENTERPRISES, INC.; CONTINUUMCARE)	
PHARMACY LLC; MEDICAL PARK)	
PHARMACY LTC, INC.; WEST VIRGINIA)	
CVS PHARMACY, L.L.C.; MRNB, INC.;)	
RXBYTEL, INC.; RITE AID OF WEST)	
VIRGINIA, INC.; KROGER LIMITED)	
PARTNERSHIP I; SAFE RX PHARMACIES,)	
INC.; PASTM, INC; CROSS LANES)	
FAMILY PHARMACY, INC; and)	
BEEWELL PHARMACY, INC.,)	
)	
Defendants.)	

CONSENT TO REMOVAL

COMES NOW Defendant West Virginia CVS Pharmacy, Inc., by and through their undersigned counsel, and hereby notifies this Court, as well as other parties that they consent to the removal of Civil Action No. 18-C-340 from the Circuit Court of Kanawha County, West Virginia to the United States District Court for the Southern District of West Virginia. Defendant consents to removal, without waiving any defenses, exceptions, or obligations that may exist in their favor on state or federal court.

Dated this 13th Day of April, 2018.

West Virginia CVS Pharmacy, Inc.,

By counsel

/s/ Carte P. Goodwin

Carte P. Goodwin, Esq. (WVSB #8039)

FROST BROWN TODD, LLC

500 Virginia Street East, Suite 1100

Charleston, West Virginia 25301-3207

Phone: (304) 348-2422

Facsimile: (304) 345-0115

cgoodwin@fbtlaw.com

Counsel for Defendant

CONTINUUMCARE PHARMACY LLC

By: SPILMAN THOMAS & BATTLE, PLLC

/s/ Gerald M. Titus, III

Gerald M. Titus, III (WV State Bar # 9392)

James E. Simon (WV State Bar # 13265)

300 Kanawha Boulevard, East (Zip 25301)

Post Office Box 273

Charleston WV 25321-0273

(304) 340-3800 / (304) 340-3901 (facsimile)

gtitus@spilmanlaw.com

jsimon@spilmanlaw.com

Counsel for Defendant Continuumcare

Pharmacy LLC

EXHIBIT D

West Virginia Secretary of State — Online Data Services

Business and Licensing

Online Data Services Help

Business Organization Detail

NOTICE: The West Virginia Secretary of State's Office makes every reasonable effort to ensure the accuracy of information. However, we make no representation or warranty as to the correctness or completeness of the information. If information is missing from this page, it is not in the The West Virginia Secretary of State's database.

RXBYTEL, INC.

Organization Information								
Org Type	Effective Date	Established Date	Filing Date	Charter	Class	Sec Type	Termination Date	Termination Reason
C Corporation	3/26/1986		3/26/1986	Domestic	Profit		11/1/2013	Revoked (Failure to File Annual Report)

Organization Information			
Business Purpose	4461 - Retail Trade - Health and Personal Care Stores - Health and Personal Care Stores (pharmacy, cosmetics, beauty supply, perfume, optical, food supplements)		Capital Stock 10000.0000
Charter County	Kanawha		Control Number 0
Charter State	WV		Excess Acres 0
At Will Term	Member Managed		
At Will Term Years	Par Value		1.000000
Authorized Shares	10000		

Addresses	
Type	Address
Notice of Process Address	WALTER L MOORE III 425 W. WASHINGTON STREET CHARLESTON, WV, 25302 USA
Principal Office Address	425 W WASHINGTON STREET CHARLESTON, WV, 25302 USA
Type	Address

Officers	
Type	Name/Address
Incorporator	WALTER L. MOORE 1020 NORTHWAY DRIVE SAINT ALBANS, WV, 25177 USA
President	WALTER L. MOORE 425 W. WASHINGTON STREET CHARLESTON, WV, 25302 USA
Type	Name/Address

Date	Amendment
10/1/1999	CHANGE OF NAME FROM PHARMACYXPRESS, INC. TO RXBYTEL, INC.
9/22/1997	CHANGE OF NAME FROM ST. ALBANS VALU-RITE, INC. TO PHARMACYXPRESS, INC.
Date	Amendment

Annual Reports	
Date filed	
3/17/2010	

6/10/2009
7/16/2008
12/3/2007
9/18/2006
12/14/2005
4/13/2005
3/24/2004
4/9/2003
10/29/2001
3/22/2001
Date filed

For more information, please contact the Secretary of State's Office at 304-558-8000.

Sunday, April 15, 2018 — 3:22 PM

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West Virginia Secretary of State — Online Data Services

Business and Licensing

Online Data Services Help

Business Organization Detail

NOTICE: The West Virginia Secretary of State's Office makes every reasonable effort to ensure the accuracy of information. However, we make no representation or warranty as to the correctness or completeness of the information. If information is missing from this page, it is not in the The West Virginia Secretary of State's database.

SAFE RX PHARMACIES, INC.

Organization Information								
Org Type	Effective Date	Established Date	Filing Date	Charter	Class	Sec Type	Termination Date	Termination Reason
C Corporation	5/15/2007		5/15/2007	Foreign	Profit		12/21/2012	Revoked (Failure to File Annual Report)

Organization Information			
Business Purpose		Capital Stock	
Charter County		Control Number	93902
Charter State	NV	Excess Acres	
At Will Term		Member Managed	
At Will Term Years		Par Value	
Authorized Shares			

Addresses	
Type	Address
Local Office Address	335 FOURTH AVENUE HUNTINGTON, WV, 25701
Mailing Address	503 FOURTH STREET EAST SOUTH POINT, OH, 45680 USA
Notice of Process Address	KENT FREEMAN 335 FOURTH AVENUE HUNTINGTON, WV, 25701
Principal Office Address	503 FOURTH STREET EAST SOUTH POINT, OH, 45680 USA
Type	Address

Officers	
Type	Name/Address
President	KENT FREEMAN 503 EAST 4TH STREET SOUTH POINT, OH, 45680
Type	Name/Address

Mergers				
Merger Date	Merged	Merged State	Survived	Survived State
5/16/2007	SAFESCRIPIT OF OHIO, INC.	OH	SAFE RX PHARMACIES, INC.	NV
Merger Date	Merged	Merged State	Survived	Survived State

Date	Amendment
5/16/2007	MERGER: MERGING SAFESCRIPIT OF OHIO, INC., A QUALIFIED OH CORPORATION WITH AND INTO SAFE RX PHARMACIES, INC., A QUALIFIED NV CORPORATION, THE SURVIVOR
Date	Amendment

Annual Reports

Date filed
9/14/2011
6/14/2010
8/17/2009
5/29/2008
Date filed

For more information, please contact the Secretary of State's Office at 304-558-8000.

Sunday, April 15, 2018 — 3:23 PM

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

City of Huntington, City of Charleston, City of Kenova,
and Town of Ceredo

(b) County of Residence of First Listed Plaintiff Kanawha
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

See Attachment

DEFENDANTS

Express Scripts Holding Co., Express Scripts, Inc., et al.

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

See Attachment

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question
(U.S. Government Not a Party)
- ☒ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input checked="" type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☐ 1 Original Proceeding ☒ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. §§ 1332, 1441, 1446, and 1453.

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

04/16/2018

SIGNATURE OF ATTORNEY OF RECORD

/s/ Charles R. Bailey

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

Attorneys for Defendants Express Scripts Holding Company and Express Scripts, Inc.

Charles R. Bailey
(WV Bar No. 0202)
Justin C. Taylor
(WV Bar No. 8014)
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Email: jtaylor@baileywyant.com

Matthew I. Menchel (*pro hac vice pending*)
(FL Bar No. 12043)
Adriana Riviere-Badell (*pro hac vice pending*)
(FL Bar No. 30572)
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F: +1 415 582 4811
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Steven G. Kobre (*pro hac vice pending*)
(NY. Bar No. 2581940)
Alana F. Montas (*pro hac vice pending*)
(NY Bar No. 5078878)
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New York, NY 10022
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F: +1 212 488 1220
Email: steven.kobre@kobrekim.com
Email: alana.montas@kobrekim.com

Attorneys for Plaintiffs

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The Webb Law Centre, PLLC
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